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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-371

JAMES VINCENT KEOGH, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner James Vincent Keogh respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in these proceedings on March 12, 1971, by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 440 F.2d 737 and is reprinted as Appendix A hereto, p. 1a, *infra.*

The opinion of the United States District Court for the Southern District of New York (Weinfeld, J.) is reported at 316 F.Supp. 921 and is reprinted as Appendix B hereto, p. 21a, *infra.*

JURISDICTION

On August 5, 1970, Judge Weinfeld of the United States District Court for the Southern District of New York denied in all respects petitioner's second application for a writ of error *coram nobis.* That action was affirmed by the United States Court of Appeals for the Second Circuit, its opinion and judgment being entered on March 12, 1971. A timely petition for rehearing and an *en banc* request were denied on April 16, 1971.

On timely application, Mr. Justice Harlan on July 7, 1971, signed an order extending the time for filing this petition for writ of certiorari to and including September 13, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a *coram nobis* application to invalidate a prior federal court conviction because of prosecutorial non-disclosure of material evidence, the writ should issue "only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he probably would have raised a reasonable doubt as to his guilt in the mind of a conscientious juror."

2. Whether a *coram nobis* application raising significant and disputed factual issues as to the ma-

teriality of evidence suppressed by the prosecution necessitates an evidentiary hearing before the trial court, particularly where an appellate court has previously remanded the matter for determination by the trial court in contemplation that an evidentiary hearing would be had, and where the parties have not made a specific request for such a hearing.

3. Whether *coram nobis* relief, by way of invalidating a prior federal court conviction, should be granted where the application on its face and without factual proof to the contrary shows that the suppressed evidence would have provided the accused with strong documentary corroboration of defenses actually made at the trial.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 1651(a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

A. The Conviction

Petitioner was formerly a Justice of the Supreme Court of New York for Kings County. In 1962, the petitioner and two co-defendants, Elliot Kahaner and Antonio Corallo, were convicted by a jury in the federal court for the Southern District of New York on charges of conspiracy to influence, obstruct or impede justice in violation of 18 U.S.C. § 1503. The trial, which lasted about one month, was presided over by District Judge Weinfeld.

The principal Government witnesses at the trial were Dr. Robert M. Erdman and Sanford J. Moore, two other co-defendants as to whom the indictments were severed.[1] Moore testified that he had paid $35,000 for the purpose of corruptly influencing a criminal proceeding in the Eastern District of New York in which he was charged, along with other officers and employees of Gibraltor Amusements Ltd., with concealment of assets in a bankruptcy proceeding in the Eastern District. Moore testified that he had paid the $35,000 in the form of some 600 bills of small denominations to Dr. Erdman, who represented that he gave a portion of it to Elliot Kahaner, then a United States Attorney for the Eastern District, and the balance to the petitioner, then a Justice of the Supreme Court of New York. This testimony concerning the mode of paying the bribe, together with testimony as to a certain investment made at about the same time by Moore and others in the Ace Manufacturing Co. of Baltimore, played a major role in petitioner's claim that the so-called bribe money had gone not to him but to finance the Ace investment. Documentary confirmation of that claim, indicating that a bank deposit of some 600 bills of small denominations had in fact been used to finance the Ace investment, was later uncovered in a suppressed FBI report, thus forming the main basis of the *coram nobis* application now in issue before this Court.

At the conclusion of the trial and after deliberation, the jury found it impossible to come to an agreement.

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[1] Dr. Erdman later received a suspended sentence. Moore has never been brought to trial. A business associate of Moore, Gabe Forman, was named as a co-conspirator but not as a defendant in the indictment. For a general account of the case, see Guthman, *We Band of Brothers*, ch. 8, 137-143 (1971).

The so-called "Allen charge" was then given the jury, and repeated at its request. Verdicts of guilty ensued. The convictions of the petitioner and of Kahaner and Corallo were affirmed by the Second Circuit on appeal, though not before noting a variety of discrepancies at the trial. *United States* v. *Kahaner,* 317 F.2d 459 (2d Cir. 1963). This Court then denied certiorari. *Corallo* v. *United States,* 375 U.S. 835 (1963).

B. The First Coram Nobis Application

In May of 1967, after having served eight months of his two-year sentence and completed probation for the remainder, the petitioner brought before Judge Weinfeld of the Southern District a petition for writ of error *coram nobis.* He charged that in several respects the prosecution had knowingly suppressed exculpatory evidence or used perjured testimony. The critical exculpatory evidence relied upon was found by petitioner in an FBI report, dated November 28, 1961, which had recently been supplied petitioner's counsel in response to a subpoena served upon the Government during a New York state disbarment proceeding against petitioner.[2] Petitioner's application for the *coram nobis* writ was summarily denied by Judge Weinfeld, without a hearing, on July 14, 1967. 271 F. Supp. 1002 (S.D. N.Y. 1967).

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[2] The subpoena was executed during a disbarment hearing conducted by the Honorable Bruce Bromley, special referee appointed by the Court of Appeals of New York. That court had ruled that petitioner should "be privileged to relitigate the issue of his guilt by introducing, if he can, evidence which was unavailable to him upon the trial in the Federal Court." *Matter of Keogh,* 17 N.Y. 2d 479, 214 N.E. 2d 163 (1965). The disbarment proceeding is still pending.

The Second Circuit affirmed Judge Weinfeld's action in various of its particulars, but remanded the matter for an evidentiary hearing on petitioner's contention that the aforementioned FBI report revealed four unexplained bank deposits made by Dr. Erdman during a critical period. Those deposits, if not otherwise explained, would have supported petitioner's contention at the trial that Dr. Erdman had kept any bribe money he received and did not convey any of it to petitioner.[3] *United States* v. *Keogh,* 391 F. 2d 138 (2d Cir. 1968).

In so remanding the matter for an evidentiary hearing, the Second Circuit directed Judge Weinfeld to "determine whether the Government's failure to turn over the [FBI] report was sufficiently serious in its motivations or consequences to warrant the extraordinary relief of coram nobis", 391 F. 2d at 149. And in the course of its opinion, 391 F. 2d at 146-148, the Second Circuit undertook to delineate the various categories of cases relating to prosecutional nondisclosure and to indicate what must be shown in each category to warrant post-conviction relief either under 28 U.S.C. § 2255 or by way of *coram nobis:*

(1)

> "The easy cases . . . are where the prosecutor's suppression is 'deliberate,' by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention." 391 F. 2d at 146-147.

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[3] As the Second Circuit noted, "The state of Erdman's finances thus had an importance almost equal to Keogh's and Kanaher's and the prosecutors properly required this to be investigated." 391 F. 2d at 142.

(2)

"It is also settled that 'the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963)." 391 F. 2d at 147.

(3)

"There remains a third category of cases—where the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use. While we do not dispute that relief may sometimes be granted even in such cases, the standard of materiality must be considerably higher . . . the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the accused would have altered the result. . . . When we consider a *coram nobis* petition such as this, we find further reason for insisting on a relatively high showing of materiality. . . . On a *coram nobis* petition such as this, it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction. Indeed it is arguable that, absent deliberate prosecutional misconduct, *coram nobis* should be denied unless the undisclosed evidence would raise such a doubt in the court's own mind." 391 F. 2d at 147-148.

The Second Circuit ordered the remand because "the record is not sufficient [with respect to the

Erdman bank deposits] to tell us how the case should be decided under either of the standards we have sought to elucidate." 391 F. 2d at 149. Conceivably, if petitioner were able to prove that the deposits came from a suspicious source, a court might conclude that the testimony of Moore and Erdman as to a later delivery date of the bribe money "was not so impregnable that a conscientious juror might not have more than a capricious doubt of Keogh's guilt." *Ibid.*

C. The Evidentiary Hearing on the First Application

Judge Weinfeld conceived the only issue before him on the remand was with regard to the immediate source of the four bank deposits listed in the FBI report of November 28, 1961. After an evidentiary hearing, he concluded that "each of the four deposits derived from an innocent source" and that the Government's attorneys were "without motivation" when they failed to disclose the information in the FBI report to defense counsel. 289 F. Supp. 265 (S.D. N.Y. 1968). *Coram nobis* relief was accordingly denied once again.

On appeal, the Second Circuit held that the various factual findings relating to the source of the four deposits were based "on ample evidence." 417 F. 2d 885 (2d Cir. 1969). The court indicated that it was "satisfied that if the defense, armed with the FBI report of November 28, 1961, had endeavored to prove that any of the four deposits represented the bribe money and the Government had responded as it did at the *coram nobis* hearing, no reasonable juror would have been led to entertain a reasonable doubt on that score." 417 F. 2d at 887. But the court added that "a different conclusion might be reached if the

Government had handed over the report in the course of the trial, the defense had established the deposits, and, because of a need to avoid undue protraction, the prosecution had had no opportunity to develop the facts as has now been done." *Ibid.*

The Second Circuit's opinion also took note of two new claims by petitioner that additional suppressed material had been revealed in the hearing before Judge Weinfeld on the remand. Judge Weinfeld had refused to consider these new matters, feeling that they lay outside the limited scope of the remand. During the remand hearing the Government had been forced to turn over an additional FBI report, dated February 26, 1962, which contained material evidence which petitioner claimed would have been of central importance to the defense had the evidence been made available at the original trial.[4] At the trial, one of petitioner's prime defenses had been that the bribe money allegedly transmitted to petitioner through Erdman, in the form of many bills of small denominations, had actually been used to finance an investment by Moore and Forman in the Ace Manufacturing Co. of Baltimore. This claim was essentially a logical deduction from the following testimony of the Government's witnesses:

(1) The money used in the bribe came from Forman, who in turn had taken it out of a slot machine company in England in which Moore and Forman had a 50% interest. Vincent Belmont held the other 50% interest.

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[4] Another FBI report, dated January 24, 1962, which contained additional information related to that in the report of February 26, 1962, had been turned over to petitioner during the state disbarment proceedings.

(2) Moore testified before the grand jury that about $85,000 had been transferred to him through Forman from the English company. He stated that of that amount, $25,000 had been disbursed to Belmont for his share in the company, $25,000 had been given to Erdman for the bribe (with an additional $10,000 to be borrowed), and about $33,000 had been used to make the Ace investment.

(3) Moore testified repeatedly that the $85,000 had been deposited in his corporate or personal accounts at the Meadowbrook National Bank on Long Island. But at the trial, the Government presented records of Moore's accounts showing that in one of them $25,000 had been deposited and that the remainder of the alleged $85,000 in deposits could not be found. Indeed, the Government stipulated that only $25,000 could be found in any of Moore's accounts as having been received from England. The Government's claim was that this $25,000 deposit had been utilized to make the bribe payment, a claim based on testimony that the $25,000 had been withdrawn and changed into bills of small denominations.

If there was only $25,000 deposited in Moore's accounts from England, a serious question was raised (a) whether the bribe money was ever raised, or (b) whether the $25,000 bribe money was in fact used to make the Ace investment, an investment clearly established by the evidence. Petitioner could thus logically claim that the $25,000 had not gone to him but had probably been used in the Ace investment venture.

What the FBI reports subsequently revealed was the startling and confirmatory information that the

$33,000 Ace investment had indeed been financed by a deposit in Louis Forman's bank account of about 600 bills ranging in denomination from $10 to $100. The deposit of those bills, in what the Second Circuit called a "peculiar manner," served to cover a check in Forman's name for $33,332.66, a check that paid for the joint investment in Ace by Forman and Moore. And it was equally significant that Forman declined to discuss with the FBI the source of this strange deposit.[5]

These documented facts were both exculpatory and confirmatory of petitioner's defense that the small denomination bills went not to him but to the Ace investment. As the Second Circuit has earlier conceded, "the evidence that Forman had $33,350 in small bills on May 5 [1961] would have materially strengthened Keogh's claim that Erdman had never given him any of the bribe money." 417 F. 2d at 889.

The second contention pressed upon the Second Circuit at this juncture grew out of certain evidence revealed at the evidentiary hearing regarding the four bank deposits. Bank officials there testified that Mrs. Erdman had a safe deposit box, that she purchased a $15,000 U.S. Savings Bond on June 28, 1961, and that she closed out the box on the following day, June 29. Emphasizing that June 28 was the day that Moore

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[5] The other portion of the $50,000 investment in Ace was made by Erdman.

It should be noted that the second contention mentioned in the text above, dealing with Mrs. Erdman's safe deposit box and the purchase of U. S. Savings Bonds, is encompassed by this petition and by the questions herein presented, p. 2, *supra*, though not included as among the reasons for granting certiorari.

first told the FBI that there was a supposed "fix" of his criminal case and that he had implicated Erdman the next day, petitioner contended that these new facts would have permitted his counsel to urge a new line of defense that someone other than himself had received and used the bribe money. That defense, as the Second Circuit noted, 417 F. 2d at 888, would have been

> "... that Dr. Erdman gave his wife the $15,000 in cash, representing the first installment of the bribe money, 391 F. 2d at 144, to hold in her safe deposit box; that, to avoid this being traced, he met his current financial needs by causing her to redeem the inherited Savings Bonds 'and put money into circulation through the indirect route of his mother-in-law'; and that, becoming frightened at Moore's disclosures, Erdman had his wife remove the money, close the vault, and purchase new Savings Bonds."

The Second Circuit indicated that it could not itself direct issuance of the writ *coram nobis* since these new developments had not been explored in depth. It then resolved the problem in the following fashion (417 F. 2d at 889-890):

> "While we could doubtless vacate the order and permit further consideration in this same proceeding of the two points here recounted, we think it better to affirm without prejudice to Judge Keogh's filing a new petition if he so desires. By doing this we indicate our approval of the district court's conclusion with respect to the four deposits. At the same time we leave open for exploration in a new proceeding the issue whether evidence developed by the Government in making that demonstration or to which petitioner would have been led by disclosure of the February 26, 1962 report constitutes a sufficient basis for is-

> suance of the writ under the criteria laid down in our last opinion, 391 F. 2d at 146-148, and in United States v. Miller, 2 Cir., 411 F. 2d 825, 830, 832 (1969)."

The District Court was also urged to review its findings regarding the motivations of the prosecutors "if evidence developed at any new hearing should so require." 417 F. 2d at 890.

D. The Second Coram Nobis Application

In accordance with the suggestion of the Second Circuit, petitioner filed a new second application for writ of error *coram nobis* in the District Court. On August 4, 1970, in a lengthy opinion, Judge Weinfeld denied the application without an evidentiary hearing. See Appendix B hereto, p. 21a, *infra.*

As later stated by the Second Circuit on the appeal from Judge Weinfeld's denial of the second application, the proceedings before Judge Weinfeld "took a course quite different from what we had envisioned" in its prior opinion in 417 F. 2d at 889-890. More specifically:

> "Although we had not directed an evidentiary hearing in so many words, our opinion rather clearly contemplated one. Instead of the simple petition which was all that would have been needed to obtain this, Keogh filed an elaborate one, dated December 24, 1969, which was supplemented by a long affidavit, in the nature of a legal argument, by the counsel who has represented him in these *coram nobis* proceedings. The Government's initial response, late in January 1970, was that these papers 'raise in minute detail numerous issues of fact and law which in our opinion require extensive preliminary investigation and a full evidentiary hearing in order to

> provide the Court with sufficient facts to decide the questions.' It was given until May 4 to file a response. The Government then sought and obtained an additional extension to June 1, representing that extensive factual inquiry not only into the record 'but also into extrinsic matters which happened or allegedly happened eight or nine years ago' had 'disclosed evidence substantially negating petitioner's claim of materiality.' " Apppendix A hereto, p. 3a, *infra.*

But the Government never submitted such evidence. Instead, the Government moved to dismiss the *coram nobis* petition on the ground that petitioner had failed to support it with affidavits of fact based on personal knowledge which, if true, would merit issuance of the writ. Accompanying the motion were several affidavits by Government attorneys, including an affidavit by one of the prosecutors that, in the words of the Second Circuit, "irrelevantly and almost certainly incorrectly" asserted that defense counsel had had access long ago to the newly revealed FBI reports. Appendix A hereto, p. 4a, *infra.* The Government further averred in these affidavits that the prosecutors had never concealed or suppressed any report or information to which defense counsel might have been entitled. In response, petitioner's counsel submitted an argumentative reply affidavit, plus an affidavit from petitioner's trial counsel stating that he had never received or seen any of the FBI reports in question.

In the reply affidavit submitted prior to the oral argument on the motion to dismiss, petitioner's counsel had clearly stated that "Absent some indication that the government can produce . . . evidence of an innocent source of the $33,350 deposit, no hearing is necessary and the writ should issue summarily. . . .

[but that] In the event that this Court orders an evidentiary hearing, the government should be held to have the burden of proving beyond a reasonable doubt that the failure to turn over the exculpatory evidence contained in the FBI reports was not prejudicial to the Petitioner."

Some confusion developed at the oral argument as to the procedural situation. Petitioner's counsel reiterated that "in view of the papers submitted by the Government it appears . . . there is no necessity for a hearing because they raise no arguable or justiciable issue," but that "If your Honor is inclined to have a hearing anyway, I certainly think that the burden of going forward to show innocence as to these on their face exculpatory matters . . . should be on the government." (215a). This statement was made in response to Judge Weinfeld's remark at the start of the oral argument that he conceived the issue to be decided at this argument on the Government's motion to dismiss was "whether or not there will be a hearing." At the end of the argument, without having indicated on what basis he would determine the necessity of a hearing, Judge Weinfeld announced that he would decide "upon the papers as submitted by counsel."

Judge Weinfeld then proceeded to issue a lengthy opinion dismissing the *coram nobis* petition in all respects, stating that the merits thereof would "be decided upon the moving papers, the files, and the trial and hearing records of the case without regard to any new matter presented in the government's answering affidavits." Appendix B hereto, p. 22a, *infra*. The Second Circuit later noted that "there was precious little" in those Government affidavits by way of new matter, and confessed "some regret

that an evidentiary hearing was not held." Appendix A hereto, p. 5a, *infra.*

As to the merits of the two basic contentions raised in the *coram nobis* petition, Judge Weinfeld ruled:

(1) The claim with respect to the previously unrevealed safe deposit box of Mrs. Erdman and the purchase of U.S. Savings Bonds was found to be without merit since that information was accessible to the defense at the criminal trial; the records of the bank involved could have been subpoenaed at that time. Moreover, the claim was held to be without evidentiary support. See Appendix B hereto, pp. 23a-29a, *infra.*

(2) As to the information contained in the FBI reports concerning the Ace investment, Judge Weinfeld ruled that petitioner had not offered a "scintilla of evidentiary support" for his charge that the failure to turn over the reports was the result of deliberate suppression by the prosecution. And petitioner was found not to have established that these reports were not turned over and made available to the defense before or at the trial. The substance of the information in those reports was said to have been either fully developed at the trial upon cross-examination of Moore, Erdman and Forman and hence known to the defense, or was readily available by further cross-examination or by subpoena. Such information, in any event, was held not to be exculpatory; the FBI reports merely provided documentary corroboration of those who testified to the Ace transaction and thus could not have been material to the defense or to the outcome of the trial. Finally, Judge Weinfeld ruled that in the absence of petitioner's presentation of affidavits from the participants in the Ace transac-

tion (including Moore, Erdman and Forman), the claim rests "upon surmise and conjecture" and should be dismissed without a hearing. In short, the proof did not meet the standards for issuance of the *coram nobis* writ, as laid down earlier by the Second Circuit in *United States* v. *Keogh,* 391 F. 2d at 146-148. See Appendix B hereto, pp. 29a-47a, *infra.*

The Second Circuit affirmed the actions of Judge Weinfeld, though indicating that "we would have been better satisfied with a record that contained oral testimony" at least as to the Ace transactions. In so ruling, the Second Circuit found that it could add nothing to Judge Weinfeld's rejection of the claim relating to Mrs. Erdman's safe deposit box and the purchase of U. S. Savings Bonds. It accordingly limited its opinion "to the more serious questions . . . relating to the FBI reports of February 26 and January 24, 1962." See Appendix A hereto, p. 5a, *infra.*

As to those FBI reports, and the newly-uncovered evidence therein concerning the Ace investment and the deposit of many small bills in the Forman bank account, the Second Circuit tested the eligibility of such new evidence for relief by way of *coram nobis* in accordance with the standard applicable to the third category of cases mentioned in its earlier opinion, 391 F. 2d at 147, i.e.,

> ". . . where the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use."

And the Second Circuit thus treated this case "with the attendant higher standards of materiality, particularly in *coram nobis.*" See Appendix A hereto,

p. 15a, *infra*. In denying the availability of *coram nobis* relief under this high standard, the Second Circuit ruled:

(1) Since a hearing "was not sought either by petitioner's counsel, quite possibly for strategic reasons, or by the Government," and since the court was not "convinced by examination of the record that the interests of justice so required," the Second Circuit declined to order that an evidentiary hearing be held by Judge Weinfeld—as the Second Circuit's earlier opinion had clearly contemplated, 417 F. 2d at 889. See Appendix A hereto, p. 6a, *infra*.

(2) The Second Circuit disagreed with Judge Weinfeld that it had not been established that the FBI reports of January 24 and February 26, 1961, had not been turned over and made available to the defense before or at the trial. The affidavit of petitioner's trial counsel that such reports had not been turned over had not been controverted adequately, and thus the Second Circuit assumed that the reports were but recently unearthed. See Appendix A hereto, p. 7a, *infra*.

(3) The Second Circuit ruled, however, that "Despite some surface plausibility in the contention that the defense would have been materially aided by knowledge that Moore and Forman had $33,500 in bills ranging from $100 to $10 in May, 1961, analysis convinces us that Judge Weinfeld was correct in concluding that this would not have created a reasonable doubt of petitioner's guilt in the mind of a juror who was otherwise satisfied—even if we assume the applicable test in *coram nobis* to be no higher than that, see 391 F. 2d at 148." See Appendix A hereto, p. 15a, *infra*. More particularly:

(a) Any suggestion that the cash deposits of May 5, 1961, represented a return of the bribe money "would have met with vigorous denial on the part of the only three persons having knowledge of the facts—Erdman, Forman and Moore." And "even if the jury had chosen to disbelieve all three witnesses and infer that nevertheless the $33,500 came from Erdman, it is by no means clear that this would have worked in Keogh's favor .... [for] in view of Forman's [other] testimony ... if the jury had accepted that the immediate source of the $33,500 in bills was Erdman, it might well have inferred also that the ultimate source of the bulk of the money could have been Keogh." See Appendix A hereto, pp. 15a-17a, *infra*.[6]

(b) Moreover, "a successful effort to develop that the $33,500 represented a return of the bribe money would have impaired the defense's most solid argument for the theory that Erdman had always kept this. If Erdman had returned the bribe money, what reason would there have been for him to indorse Moore's dubious $50,000 notes to the trustee in bankruptcy? And how, on the hypothesis of a return, could the defense have made the effective use it did of Erdman's oral and written statements to the trustee that he had security of $35,000? To ask the jury to believe that, despite all the contrary evidence, Forman had forced Erdman *both* to repay $33,500, *and* to indorse $50,000 in notes, with some arrangement whereby Forman and Moore would indemnify him to the extent of $35,000

[6] The court added that "This would have been damaging in the last degree since, among other things, it would have been destroyed the defense's strong reliance on the Government's inability to trace what Keogh or Kahaner had done with the money allegedly received." Appendix A hereto, p. 17a, *infra*.

. . . would have been a far less effective tactic than the one followed in . . . [defense counsel's] cross-examination of Forman . . . and in the summation. This was that it was because Erdman had *kept* the money that Moore and Forman were able to press him into indorsing the $50,000 of notes." Appendix A hereto, pp. 17a-18a, *infra.*

(c) Thus, with "the defense having made this wise tactical choice and having failed to propound questions of Moore and Forman about the Ace investment that obviously must have occurred to such 'diligent defenders' . . . as counsel for Keogh and Kahaner, we see no sufficient basis for invalidating the conviction because of failure to turn over the February 26 or January 24 reports." Appendix A hereto, pp. 18a-19a, *infra.* In so holding, the Second Circuit stated in footnote 12 of its opinion that it was not suggesting that "counsel is under any obligation to urge only consistent theories of defense," but, on the other hand, "in endeavoring to determine after the event whether evidence could have been put 'to not insignificant use,' a court cannot assume that counsel would deliberately have undercut a stronger theory of defense by pressing a less persuasive and inconsistent use, and certainly cannot expect the prosecution to have anticipated such a course."

REASONS FOR GRANTING THE WRIT

These prolonged and complex *coram nobis* proceedings have given rise to a disturbing landmark in federal jurisprudence. Acting to fill a void in the controlling decisions of this Court, the Second Circuit has sought to articulate definitive standards for assessing *coram nobis* efforts to invalidate prior convictions by reason of prosecutorial non-disclosure of material evidence.

The result has been the creation of confusing and self-contradictory standards, in conflict with relevant decisions of this Court and of other Circuits and with the basic thrust of the constitutional duty of prosecutors to disgorge evidence favorable or useful to the accused. Left unreviewed and unclarified, such standards as authored by a most influential and respected tribunal can have an unfortunate impact upon the development of federal post-conviction law. Federal courts, often inundated with challenges to the validity of earlier convictions, need guidance that is not only definitive but clear and consistent with the constitutional notions of due process. A basic reason why certiorari should be granted in this case is that the Second Circuit, despite its good intentions, has failed to provide that kind of guidance.

1. IMPORTANT AND RECURRING QUESTIONS ARE RAISED AS TO THE AVAILABILITY OF CORAM NOBIS RELIEF BASED ON PROSECUTORIAL NON-DISCLOSURE OF MATERIAL EVIDENCE

It is now axiomatic that the obligation of the prosecutor to disgorge material evidence favorable to an accused is of constitutional dimensions; even a good faith withholding of such evidence can invalidate a conviction for lack of due process. *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963). And it is equally clear that such a denial of due process must be classed among those errors "of the most fundamental character . . . such as rendered the proceeding itself irregular and invalid," *United States* v. *Mayer,* 235 U.S. 55, 67 (1914), so as to warrant relief by way of *coram nobis* after a prison sentence has been fully served.

The critical problem posed by the decision below is how to delineate the circumstances under which such a fundamental defect will warrant relief from the con-

viction at so late a date by means of a *coram nobis* writ. This Court has not yet addressed itself to that problem. But in the course of holding that a federal court is empowered by the All-Writs Section of the Judicial Code, 28 U.S.C. § 1651(a), to issue writs of *coram nobis,* the Court has said that so extraordinary a remedy should be allowed "only under circumstances compelling such action to achieve justice." *United States* v. *Morgan,* 346 U.S. 502, 511 (1954). What, then, are the circumstances respecting prosecutorial non-disclosure that will compel *coram nobis* action "to achieve justice"? What standards of proof are to be imposed on the *coram nobis* applicant? When is a *coram nobis* applicant entitled to an evidentiary hearing in order to satisfy those standards of proof?

The Second Circuit has here attempted to answer such questions for the category of *coram nobis* cases rather confusedly described as those "where the suppression was not deliberate . . . and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use." That reference to "not insignificant use," if meant as a standard for measuring entitlement to *coram nobis* relief, could be construed as a most liberal test from the applicant's standpoint. It implies that *coram nobis* relief is proper when the defense could have made "not insignificant use" of the suppressed evidence at the trial, without regard to whether such use would probably have produced an acquittal or some different verdict.[7]

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[7] So formulated, such a test for *coram nobis* applications would be consistent with and similar to the new trial motion standard developed by this Court in *Griffin* v. *United States,* 336 U.S. 704, 709 (1949)—*i.e.,* "whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

A close reading of the Second Circuit's opinion causes the "not insignificant use" reference to pale into irrelevancy. But the very fact that the reference is there and is given such prominence in the various opinions in this proceeding is bound to breed confusion, false hopes and unintended consequences as litigants and courts seek guidance in the years ahead from the rulings in this case.

The dominant and indeed exclusive thrust of the Second Circuit's standard is the notion that *coram nobis* relief is appropriate only if a court can conclude that the suppressed evidence is so highly material that its use—its "not insignificant use"—"would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror." This is a standard that is both harsh and extreme. It would limit *coram nobis* relief to those rare instances where the applicant can convince the reviewing court that he is in fact innocent and thus that an acquittal would probably have resulted at the trial had the suppressed evidence been used. There are various reasons why this unduly restrictive formula should not go unchallenged and uncorrected by this Court.

To begin with, the Second Circuit's standard is a revival of the discredited position taken by the four dissenting Justices in *United States* v. *Morgan,* 346 U.S. 502 at 514-516 (1954), a position that the majority in that case carefully rejected. The dissenters there stated that the *coram nobis* applicant must allege "his innocence of the federal charges or set forth facts from which innocence could be inferred" (p. 514) and that the "probability of a different result if the facts had been known is a prime requisite to the success

of the writ" (p. 516). But the applicant in that case obviously could not and did not prove his innocence, his *coram nobis* claim being that he had been denied the right to counsel at the trial. The important point, however, is that the majority of this Court directed an evidentiary hearing on that claim without denying that innocence had not been proved and without acknowledging that proof of innocence was a prime requisite to the issuance of a *coram nobis* writ.[8] Instead, the Court enunciated a principle that is both liberal and flexible: the writ should issue "only under circumstances compelling such action to achieve justice." 346 U.S. at 511. That concept is totally inconsistent with the Second Circuit's notion, and with the *Morgan* dissenters' notion, that the writ should issue only where innocence has been alleged and proved.

Moreover, the *Morgan* decision conceived the denial of the right to counsel to be among those errors "of the most fundamental character," *United States* v. *Mayer,* 235 U.S. 55, 67 (1914), so as to warrant upsetting a conviction through *coram nobis.* This ruling must mean that there are fundamental errors other than the conviction of what now appears to be an innocent man that justify *coram nobis* relief. Such errors must run the gamut of what this Court has conceived to be errors of constitutional dimensions

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[8] "Despite its failure to give direct attention to the strict-requirements problem and the rather limited characterization of the writ, *Morgan* has generally been interpreted as adopting the more liberal view. This interpretation is buttressed by the fact, pointed out by the four dissenters and not denied by the majority, that at least one of the stricter requirements, that of proving innocence, had not been met in the case." Note, *Postrelease Remedies for Wrongful Conviction,* 74 Harv.L.Rev. 1615, 1620 (1961).

warranting the reversal of a conviction, including the prosecutorial suppression of material evidence favorable to the accused. *Brady* v. *Maryland,* 373 U.S. 83 (1963). And thus any *coram nobis* standard restricting relief to those who can prove their innocence, such as the Second Circuit's standard attempts to do, must be viewed as inconsistent with the *Morgan* principle.

The Second Circuit's formulation actually is nothing more than a sophisticated version of an outdated test that in variable form many lower courts have long applied in assessing new trial motions and § 2255 applications premised on newly discovered evidence. That test, which has never been approved or adopted by this Court, proclaims that a new trial can be awarded only if the new evidence "would probably produce a different verdict," or "would probably produce an acquittal," or "might have led to an acquittal or a hung jury."[9] In essence, these varying versions of the new trial motion test, like the Second Circuit's *coram nobis* test, all require that the applicant show the probability if not likelihood of producing an acquittal, or at least something other than a guilty verdict.

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[9] In *United States* v. *Miller,* 411 F.2d 825, 830-831 (2d Cir. 1969), the Second Circuit recognized the differing formulations by the lower courts of the new trial motion test. It then proceeded to promulgate a still different version for gauging a motion for new trial based on the prosecutorial withholding of favorable evidence—*i.e.*, "a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence might have led to an acquittal or a hung jury."

In the course of discussing the instant claims by the petitioner and indicating that these claims should be pursued through a new *coram nobis* application, as was then done, the Second Circuit made reference to the *Miller* formulation as part of the guidance to the District Court in evaluating the application. 417 F.2d at 890.

Despite efforts to convince this Court that some version of this lower court "not guilty" standard should be sanctioned with respect to new trial motions, the Court has not deemed it advisable to consider, let alone adopt, any such version. See *United States* v. *Johnson,* 327 U.S. 106, 111, note 5 (1946); *Griffin* v. *United States,* 336 U.S. 704, 708-709 (1949); *Mesarosh* v. *United States,* 352 U.S. 1, 9 (1956). Instead, in the *Griffin* case, it announced a totally independent criterion for assessing a new trial motion (336 U.S. at 709):

> ". . . whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

The *Griffin* formula can be regarded as a flat rejection of the lower court rule that a new trial is to be had only if the new evidence would probably produce a different result, or an acquittal or a different verdict. And to the extent that the rule in *coram nobis* proceedings may properly be drawn from the formula applicable to new trial motions, the *Griffin* declaration constitutes a rejection of the basic standard here enunciated by the Second Circuit for *coram nobis* purposes. In that respect, therefore, the decision below conflicts with *Griffin.*

In the same sense, the decision below must be deemed in conflict with the District of Columbia Circuit's decision in *Levin* v. *Clark,* 408 F.2d 1209 (D.C. Cir. 1967). That case arose from a petition for habeas corpus or a new trial, alleging that the prior conviction was invalid by reason of prosecutorial non-disclosure of material evidence. In granting a new trial, the District of Columbia Circuit in fact tested the

application in the *Griffin* terms of whether the jury might have "attached significance to the evidence favorable to the defendant had the evidence been before it." And in the course of discussing the older lower court test of whether the evidence "might have led the jury to entertain a reasonable doubt about guilt," it pointed out the speculative nature of that test. In language fully applicable to the Second Circuit's *coram nobis* standard, the District of Columbia Circuit observed (408 F.2d at 1212) that

> "This [lower court] standard requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial—whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically."

And the court then proceeded to reverse for a new trial because, in the *Griffin* sense, "it is clearly within the realm of possibility that the jury would have 'attached significance' " to the undisclosed evidence. 408 F.2d at 1215.[10]

Certain other Circuits have also indicated disenchantment with the Second Circuit's notion that the

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[10] See also *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 140 (2d Cir. 1964), a habeas corpus proceeding brought by a state prisoner, where Mr. Justice Marshall (then a Circuit Judge) wrote for the court that "We cannot speculate as to the effect this [material and non-disclosed] testimony would have had on the jury if it had an opportunity to hear it."

materiality of suppressed evidence is to be gauged by the probability of raising a reasonable doubt as to guilt. Thus the Fourth Circuit, refusing to "indulge in the speculation that the undisclosed evidence might not have influenced the fact finder," has emphasized that it is enough if the exculpatory evidence "may reasonably be considered admissible and useful to the defense." *Barbee* v. *Warden,* 331 F.2d 842, 845, 847 (4th Cir. 1964). The Third Circuit has likewise indicated that a conviction is constitutionally defective if there has been prosecutorial withholding of "information impinging on a vital area in appellant's defense," *United States* v. *Maroney,* 319 F.2d 622, 627 (3d Cir. 1963), that defendants are "entitled to all pertinent facts relating to their defense" and that it is enough if the new favorable evidence "could and would have been argued by their counsel to the jury and the trial court would have charged the jury appropriately in respect thereto," *Curran* v. *State of Delaware,* 259 F.2d 707, 711 (3d Cir. 1958). And the Fifth Circuit has commented that the duty to disclose begins in the pre-trial period and that a conviction is suspect if the suppressed evidence is of "vital significance to the accused persons in planning and conducting their defense." *Ashley* v. *State of Texas,* 319 F.2d 80, 85 (5th Cir. 1963).[11]

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[11] "It is the unbalance of investigatory facilities which harms the defendant. The imbalance leads to an uninformed and poorly prepared defense, and consequently to an unfair trial. The real harm is done before the trial and it is to that period rather than to the trial and the highly speculative impact on the jury, that courts should look. If the question asked by the court is to correspond to the real needs of the defendant out of which these cases grew, and to the factor which gives these cases constitutional dimensions, it must be, what effect did the suppression have on defendant's preparation for trial?" Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 Yale L.J. 136, 145 (1964).

Enough has been said to indicate the confusion and conflict among the lower federal courts as to the proper standard to be applied in assessing the impact of suppressed evidence on the validity of prior convictions. Standards that have been developed have been applied unevenly and often without regard to the basic policy considerations at stake.

The time has thus come for this Court to clarify the circumstances wherein a prior federal conviction may be invalidated, on a *coram nobis* petition, by reason of prosecutorial non-disclosure. That clarification is particularly appropriate at this time in view of the post-*Morgan* developments respecting the constitutional voidness of convictions premised on the suppression and withholding of evidence favorable to the defendant.

And clarification is necessary here because of the dubious nature of the Second Circuit's standard. If *coram nobis* is to be limited by terms of that standard, does not that limitation in turn circumscribe the duty of prosecutors to reveal favorable evidence to the defense? Is the prosecutor now bound to turn over only that evidence that is reasonably thought "probably would have raised a reasonable doubt as to . . . guilt in the mind of a conscientious juror"? Or must he continue to turn over evidence that would, in the terms of the *Griffin* opinion, 336 U.S. at 709, permit the jury merely to attach "significance to the evidence favorable to the defendant"? In short, the validity of the Second Circuit's standard must be viewed in terms of the interrelated constitutional duty of the prosecutor to disgorge favorable evidence. Because the Second Circuit's standard falls so far below

that constitutional norm review thereof becomes appropriate.[12]

2. AN IMPORTANT AND UNRESOLVED QUESTION IS RAISED AS TO THE RIGHT TO AN EVIDENTIARY HEARING ON A CORAM NOBIS APPLICATION.

The Second Circuit has rendered a strange and disturbing ruling, undercutting the right of *coram nobis* applicants to an evidentiary hearing. It is a ruling that deserves review and correction by this Court.

To begin with, the Second Circuit devoted a substantial part of its earlier opinion in 417 F.2d 885 to a summarization of the previously undisclosed evidence concerning the two matters put into question in the instant *coram nobis* application. The court discussed at some length (pp. 887-889) both (1) the new evidence uncovered at the earlier remand hearing concerning Mrs. Erdman's safety deposit box and the unusual purchases of U.S. Savings Bonds and (2) the newly uncovered evidence in the FBI reports concerning the Ace investment sources and the peculiar deposits in the Forman bank account.

Both of those claims were felt by the Second Circuit to raise sufficient doubts about the validity of the con-

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[12] The American Bar Association's Project on Standards for Criminal Justice has suggested that the prosecutor's duty to disclose be stated as follows: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or militate the degree of the offense or reduce the punishment at the earliest possible opportunity." Standards Relating to the Prosecution Function and the Defense Functions, Sec. 3.11, with amendments recommended in March, 1971, by Special Committee on Standards for the Administration of Criminal Justice, p. 8.

viction and to be of sufficient *prima facie* merit to warrant a new *coram nobis* application in the District Court so that there could be an "exploration in a new proceeding" of the merits or materiality of these newly uncovered matters. Indeed, the Second Circuit has now said, in the immediate opinion before this Court, that "Although we had not directed an evidentiary hearing [on these matters] in so many words, our [earlier] opinion rather clearly contemplated one." Appendix A hereto, p. 3a, *infra*.[13]

Yet the Second Circuit has sanctioned the failure of the District Court to hold the "contemplated" evidentiary hearing on two notions: (1) because neither petitioner's counsel nor the Government sought such a hearing; and (2) because the court was convinced "by examination of the record that the interests of justice" did not require that hearing. Appendix A hereto, p. 6a, *infra*.

The statement that neither party requested a hearing is factually dubious[14] and in any event does not rest

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[13] In its earlier opinion, 417 F.2d at 889, the Second Circuit had pointed out that the record as to the Ace investment claim was deficient, for decisional purposes, in that "Neither Erdman nor the prosecutor was cross-examined on the subject, no attempt was made to call Forman or Moore, and the matter was not briefed in the district court."

[14] Aside from the fact that the Second Circuit's earlier opinion clearly "contemplated" an evidentiary hearing, the Government's initial response to petitioner's new application indicated that "a full evidentiary hearing" was required to provide the District Court with sufficient facts to decide the questions raised in the new application. Moreover, the petitioner repeatedly indicated to the District Court that a hearing was unnecessary only if the Government could not offer any evidence tending to prove the innocent nature of the information revealed in the FBI reports. If a hearing was ordered by the court, petitioner asserted, the

upon any statutory or judicial precedent that a specific request is an indispensable predicate to an evidentiary hearing. And particularly where the Second Circuit intended that an evidentiary hearing be had and indicated where the factual inquiries should lie, such a request would appear unnecessary in this instance.

But the "interests of justice" relied upon by the Second Circuit should not be confined to that court's assessment of the record, which record it has already admitted should be reopened "for exploration" of the new matters. 417 F.2d at 889. Indeed, in analagous situations dealing with habeas corpus petitions, which are first cousins of *coram nobis* applications, this Court has repeatedly held that because of the high function of habeas corpus in safeguarding individual freedom—which is certainly a function in the "interests of justice"—"federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing." *Harris* v. *Nelson,* 394 U.S. 286, 291 (1969); and see *Townsend* v. *Sain,* 372 U.S. 293, 313 (1963); *Brown* v. *Allen,* 344 U.S. 443, 464, n. 19 (1953).

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burden was on the Government to prove that failure to turn over the reports was not prejudicial to petitioner.

In seeking extensions of time to reply to petitioner's new application, the Government represented that it was engaged in extensive factual investigations that were not yet complete. The Government asserted that facts already developed, to be introduced at the evidentiary hearing, would show the lack of merit in petitioner's claims. Included among the matters being investigated by the Government were pertinent English bank records, which were unavailable to petitioner and which the Government said would shortly be available for its own purposes. The Government also claimed that one of the individuals involved in the Ace transaction had refused to talk during the course of the additional investigation then under way.

The opinion in *United States* v. *Morgan,* 346 U.S. at 512-513, in effect directs the same type of evidentiary hearing for good cause shown by a *coram nobis* applicant. The Court there ruled that when the record was unclear as to whether counsel had been waived at the trial and no other remedy was available "this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court," and that in such circumstances "respondent is entitled to an opportunity to attempt to show that this conviction was invalid."

Since the Second Circuit has already determined that petitioner's claims involved in his second *coram nobis* application constituted an appropriate showing of the need for fuller exploration of the facts, those claims "must be heard by the federal trial court" in an evidentiary-type hearing in order to give him a full opportunity to comply with the Second Circuit's standard for *coram nobis* relief. To deny petitioner that right is to create a situation where "a wrong may stand uncorrected which the available remedy would right." 346 U.S. at 512. The decision below must thus be deemed in conflict with the *Morgan* decision, as well as with *Harris* v. *Nelson, supra,* and the other habeas corpus decisions.

3. IMPORTANT QUESTIONS ARE RAISED AS TO THE RIGHT TO CORAM NOBIS RELIEF WHERE THE NEWLY UNCOVERED EVIDENCE WOULD HAVE PROVIDED STRONG CORROBORATION OF THE MAJOR DEFENSE AT THE TRIAL.

The Second Circuit's foreclosure of the contemplated evidentiary hearing has made it impossible to assess the materiality of the information contained in the newly-revealed FBI reports in light of a full factual development. Had such a development been permitted,

it is conceivable that the new facts would clearly show either (1) that a reasonable doubt as to petitioner's guilt might have been raised in the jury's mind, as the Second Circuit's test demands, or (2) that the jury would certainly "have attached significance to the evidence favorable to the defendant had the evidence been before it," as this Court's *Griffin* formula suggests.

On the incomplete record before it and by utilizing a harsh and dubious standard of materiality, the Second Circuit has rendered a decision that is most destructive of the benefits which the court itself concedes the *coram nobis* writ is designed to afford. And it has done so by casting itself in the role of defense counsel, misreading the defenses that were or might have been made years ago, and assessing the wisdom of using such new evidence as a defense tactic. In short, *coram nobis* relief has been denied simply because the Second Circuit believes it would not have been tactically wise for defense counsel to use the new evidence.

The new evidence uncovered in the suppressed FBI reports has yet to be controverted by the Government as to importance or veracity. That evidence indicated that the $33,000 Ace investment by Moore and Forman had been financed from a deposit in Forman's bank account of some 600 small denomination bills totalling some $33,000—which bore striking resemblance to the nearly 600 small bills totalling that amount that allegedly formed the bribe payment. The Second Circuit rejected the materiality of the evidence of this suspicious bank deposit by suggesting that it would have supported only a new and inconsistent defense, *i.e.*, that Erdman, the go-between, had somehow received this $33,000 in small bills for bribery purposes and had then returned the money to Forman for the Ace

investment purposes. The court thought that this would have been an inherently unbelievable defense, one that defense counsel intentionally avoided using. In the Second Circuit's view, defense counsel made a far wiser tactical choice in presenting the defense that he supposedly did, *i.e.*, that Erdman had in fact kept the money and never transferred it to anyone.[15]

But the Second Circuit, in its role of second-guessing defense counsel, overlooked the major defense that was repeatedly advanced to the jury in the summation, a

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[15] The tactical situation confronting the defense, as well as the treatment to be accorded the revelation of the FBI reports, must also be viewed in light of the fact that the trial was a closely contested one, described by the Second Circuit as containing a "real basis for the existence of reasonable doubt." 317 F.2d at 485. Indeed, the Government had serious doubts about instituting criminal action against petitioner. In a memorandum to the Attorney General in 1961, the prosecutor described the key witness, Dr. Erdman, as "an enigma" who was "vulnerable because of his extra-professional interests in a slot-machine company, psychiatric treatment and his penchant for fixing cases for 'kicks.'" See Appendix A hereto, p. 9a, *infra*. And it was recommended that any decision to prosecute be held in abeyance pending the "final report from the FBI on the financial investigations."

Following a newspaper "leak" about the investigation, the indictment was brought without awaiting the receipt of the FBI report in question, dated February 26, 1962, which contained the exculpatory information. The report was of course received by the prosecutor before the trial. Thus eliminated is any question of the pre-trial awareness by the prosecution of the existence and importance of this critical FBI report. Also clear is the fact that in such a closely fought trial almost any kind of favorable or exculpatory evidence might have tipped the scales on petitioner's side. Where there was such a "sharp conflict" in the evidence and where there had been "much evidence adduced by defendants which tended to discredit" the Government's witnesses in "essential respects," 317 F.2d at 467, the withheld evidence stemming from the FBI report might well have been decisive.

defense that would have been materially bolstered had the additional facts been available and that might have then created a reasonable doubt as to petitioner's guilt. That defense involved no claim that Erdman kept the money. Rather, the claim was that the $25,000, which the bank records showed that Moore received from England and which Moore said he had turned into small denominations of cash, was used in the Ace investment and not in payment of the bribe. Indeed, the Second Circuit in its earlier opinion (417 F.2d at 888) had acknowledged the prosecution's awareness of "the importance attached by the defense to the investment in Ace," pointing out that the prosecutor had described the Ace investment as involving "the entire theory of his [Keogh's] defense."[16]

There can be no question but that the added evidence as to cash deposit of $33,350, consisting of over 600 bills and made under what can only be described as peculiar circumstances, would have dramatized and given documentary substantiation to this defense—particularly in light of Forman's refusal to reveal the source of the deposit to the FBI. The jury might have accepted the defense claim that the 600 bills allegedly constituting the bribe money had actually been utilized in making the Ace investment. The critical conclusion as to petitioner's innocence would then have followed.

A misreading of petitioner's trial strategy has caused the Second Circuit to misconstrue the materiality and

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[16] In its earlier opinion, 417 F.2d at 889, the Second Circuit accurately acknowledged petitioner's contention that "the evidence that Forman had $33,350 in small bills on May 5 would have materially strengthened Keogh's claim that Erdman had never given him any of the bribe money." That claim, of course, did not depend upon whether Erdman kept the money.

importance of the newly uncovered evidence. More importantly, the result reveals the danger implicit in the Second Circuit's test of evaluating materiality in terms of whether, with the new evidence, the accused could then have so presented his case as to raise a reasonable doubt as to his guilt. Particularly when it acts without benefit of an evidentiary hearing, a court is easily led into error in speculating as to what the tactics of defense counsel would have been had the suppressed evidence been available and as to what the jury's reaction would have been in light of possible tactical use of the evidence.

CONCLUSION

For these various reasons, this Court should grant certiorari and review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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September 13, 1971.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 480—September Term, 1970.

(Argued February 17, 1971 Decided March 12, 1971.)

Docket No. 35360

UNITED STATES OF AMERICA, *Respondent-Appellee,*

v.

JAMES VINCENT KEOGH, *Petitioner-Appellant.*

Before: WATERMAN and FRIENDLY, *Circuit Judges,* and McLEAN, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying a second petition for a writ of error *coram nobis.* Affirmed.

PHILIP HANDELMAN, Esq., New York, New York (Robert M. Trien, Esq., of Counsel), *for Petitioner-Appellant.*

WILLIAM T. MURPHY, Attorney, Department of Justice, Brooklyn, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, New York, and Mervyn Hamburg, Attorney, Department of Justice, Washington, D. C., of Counsel), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

This proceeding begins where our last opinion in this case ends, *United States* v. *Keogh,* 417 F.2d 885, 888-90

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* Of the District Court for the District of New York, sitting by designation.

(2 Cir. 1969).[1] Discovery incident to the hearing of the portion of Justice Keogh's first *coram nobis* petition, which concerned four bank deposits made by Dr. Erdman close in time to the alleged receipt of the bribe money by him, revealed the existence of an FBI report dated February 26, 1962. Another admittedly less significant FBI report dated January 24, 1962 had been made available to the petitioner in the course of his disbarment hearings. These reports related to a $50,000 investment in the Ace Manufacturing Company, a Glen Burnie, Md., concern, in late April, 1961, by Sanford Moore, whose indictment for bankruptcy fraud had triggered the alleged conspiracy to obstruct justice, Louis Forman, who was claimed to have furnished Moore with most of the bribe money earlier in 1961, and Dr. Erdman, who allegedly received the bribe money from Moore and paid it to Keogh and Kahaner. It had been developed at the trial that Moore and Forman had a two-thirds and Erdman a one-third share in this investment. The report revealed that the contribution of Moore and Forman was paid by a check in Forman's name for $33,332.66; that it was dated April 28, 1961, and was drawn on the Meadow Brook National Bank; that the account on which it was drawn was opened only on May 2, with a deposit of $100; that the check was received for payment on May 4; that the overdraft was met by a cash deposit of $33,350 on May 5; and that this deposit consisted of $19,700 in $100 bills, $9850 in $50 bills, $1800 in $20 bills, and $2000 in $10 bills. The claimed significance of this was that the bribe money allegedly paid by Moore to Erdman and transmitted to Keogh and Kahaner was made up of bills of rather similar denomination and that the deposit coincided in time with representations by For-

[1] We shall assume familiarity with that opinion and also with our earlier opinions affirming Justice Keogh's conviction, *United States v. Kahaner*, 317 F.2d 459 (2 Cir.), *cert. denied*, 375 U.S. 835, 836 (1963), and directing a hearing on one aspect of his first *coram nobis* petition, 391 F.2d 138 (1968).

man to Erdman that the latter should return the money to Moore "because he didn't deliver what he was supposed to." Hence, it was argued that "the evidence that Forman had $33,350 in small bills on May 5 would have materially strengthened Keogh's claim that Erdman had never given him any of the bribe money." 417 F.2d at 889. On the previous appeal from denial of the first *coram nobis* petition, we declined to consider this since it was not within the scope of the hearing we had directed and had "not been explored in depth"; rather we affirmed "without prejudice to Justice Keogh's filing a new petition" for *coram nobis* on this and certain other matters, 417 F.2d at 889.

The further proceedings took a course quite different from what we had envisioned. Although we had not directed an evidentiary hearing in so many words, our opinion rather clearly contemplated one. Instead of the simple petition which was all that would have been needed to obtain this, Keogh filed an elaborate one, dated December 24, 1969, which was supplemented by a long affidavit, in the nature of a legal argument, by the counsel who has represented him in these *coram nobis* proceedings. The Government's initial response, late in January 1970, was that these papers "raise in minute detail numerous issues of fact and law which in our opinion require extensive preliminary investigation and a full evidentiary hearing in order to provide the Court with sufficient facts to decide the questions." It was given until May 4 to file a response. The Government then sought and obtained an additional extension to June 1, representing that extensive factual inquiry not only into the record "but also into extrinsic matters which happened or allegedly happened eight or nine years ago" had "disclosed evidence substantially negating petitioner's claim of materiality."[2] Instead of submitting such evidence, it moved on the appointed day to

[2] Among the information awaited by the Government was data expected from a London bank.

dismiss the petition on the ground that Keogh had failed to support it "with affidavits of fact based on personal knowledge which, if they were true, would merit issuance of the Writ." This motion was accompanied by an affidavit in the nature of argument by an attorney in the Criminal Division of the Department of Justice which advanced no new facts, and two short affidavits of the prosecutors, Hundley and Lally. Hundley said that although he had no specific recollection of having seen the FBI report of February 26, 1962, during his trial preparation, he "probably had knowledge of the basic information contained in that report." He added, irrelevantly and almost certainly incorrectly, that "[d]efense counsel has had access to this report since I voluntarily turned over all the material related to" the Keogh matter to Hon. Bruce Bromley, the referee in the long pending Keogh disbarment proceedings. See *Keogh* v. *Richardson*, 17 N.Y.2d 479, 266 N.Y.S.2d 984 (1965). Lally had "no specific recollection" of having seen the February 26, 1962, report. Both prosecutors averred that they "did not in any way conceal or attempt to conceal or suppress in any manner that report or any information to which defense counsel might have been entitled." Petitioner's counsel submitted a reply affidavit, in the nature of argument. Since the Government had suggested there was no proof that the reports had not in fact been turned over, petitioner also filed an affidavit of his trial counsel, Henry G. Singer. Mr. Singer stated his best recollection was that he had not seen them; to support this he alleged that every such report turned over to him during the trial had been marked for identification and that review of the clerk's minutes in which the trial exhibits were listed showed that the two reports were not among them. Excerpts from the disbarment testimony were also attached.

With the equivalent of some 200 pages of printed matter having been thus accumulated, the Government's motion to dismiss came on for argument. It was agreed that petitioner's counsel should be heard first. He began by saying

> Your Honor, the writ in this case should issue and I would normally be beseeching your Honor for a hearing, but in view of the papers submitted by the Government it appears not only, perhaps, that I didn't need any answering papers, as was indicated to me, but certainly there is no necessity for a hearing because they raise no arguable or justiciable issue.

Since Government counsel were now in accord about the absence of need for an evidentiary hearing, Judge Weinfeld announced at the close of the argument that he would decide "upon the papers as submitted by counsel." There was no demur. In his opinion dismissing the petition he stated that the merits would "be decided upon the moving papers, the files, and the trial and hearing records of the case without regard to any new matter presented in the government's answering affidavits"—of which, indeed, there was precious little. Since we can add nothing to Part I of his decision, in which he rejected claims based on evidence of certain financial dealings of Mrs. Erdman which had come to light during the hearings on the first *coram nobis* petition, we shall limit this opinion to the more serious questions raised by Part II, relating to the FBI reports of February 26 and January 24, 1962.

Preliminarily, we must confess some regret that an evidentiary hearing was not held. While it is understandable that the Government might not have been able in 1970 to demonstrate that there was an innocent source for the $33,350 cash deposit of May 5, 1961, with the degree of certainty it had established two years earlier as regards Erdman's bank deposits of February 1961, see 417 F.2d at 887, and thereby have put the entire matter to rest, we would have been better satisfied with a record that contained oral testimony. Hundley, Lally, Singer, and other trial attorneys were surely available. So also were Moore, who has given evidence on this very matter in the disbarment proceedings, and Erdman. While Forman had re-

fused to discuss the matter under advice of counsel, this does not mean that, if subpoenaed, he would necessarily have advanced a claim of privilege or could have sustained one.[3] However, we see no basis on which we could properly reverse the district judge and order still further proceedings in this case because of his not directing a hearing which was not sought either by petitioner's counsel, quite possibly for strategic reasons, or by the Government, unless we were convinced by examination of the record that the interests of justice so required. We are not.

The district court rested its denial of the petition *on* two grounds: (1) that "it has not been adequately established that in fact these reports [of January 24 and February 26, 1962] were not turned over and available to the defense at or before the trial," and (2) that in any event the proof did not meet the standards for issuance of the writ laid down in *United States* v. *Keogh, supra,* 391 F.2d at 146-48.

In support of the first ground, the judge noted what he called the "guarded affidavit" of Mr. Singer, which said only it was his "best recollection" that he had never seen the report of February 26, 1962. In addition, the court cited examples of material turned over to the defense which had not been listed in the clerk's minutes or had not been marked for identification, and pointed to petitioner's failure to submit supporting affidavits by Mr. Singer's associates[4] or other trial attorneys.[5] Conceding some force in these

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[3] Forman was named in the indictment as a co-conspirator but not as a defendant, and the statute of limitations both on the obstruction of justice charge and on any claim of perjury at the trial has long since run. See 8 Wigmore, Evidence (McNaughton rev. 1961), § 2279(c) at 482.

[4] Mr. Singer had been assisted at the trial by John P. McGrath and C. Joseph Hallinan.

[5] Kahaner was represented by William W. Kleinman, now deceased, and Eugene Gold, Corallo by Michael P. Direnzo.

points, we think them insufficient to support the conclusion. Singer's affidavit was enough to put on the Government the burden of coming forward with proof that the reports had been furnished. It came forward with nothing except Hundley's affidavit which, by urging, apparently in error, that the February 1962 report had been turned over to Referee Bromley, inferentially admitted that it had not been disclosed at an earlier date. We will therefore assume that the defense did not have the February 1962 report until this was unearthed by discovery in the first *coram nobis* proceeding or the January 1962 report until it was produced during the disbarment hearings.

In *United States* v. *Keogh*, *supra*, 391 F.2d at 146-48, we outlined three categories of cases relating to prosecutorial non-disclosure:

(1) "[W]here the prosecutor's suppression is 'deliberate,' by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention";

(2) Where the prosecution fails to furnish evidence favorable to the accused upon request; and

(3) "[W]here the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use."

We held that issuance of habeas corpus for cases in the third category required "a substantially higher probability that disclosure of the evidence to the defense would have altered the result." We also held that the standards in *coram nobis* were higher still. This was because the only consequences still being inflicted, namely, civil disabilities and moral stigma, while serious in any case and especially

so to a former New York Supreme Court justice, were considerably less severe than continued imprisonment, and the unlikelihood of retrial would render issuance of the writ the practical equivalent of an acquittal. Hence, we said, with respect to the third category, that

> it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction.

391 F.2d at 148. Petitioner's claim here is, in effect, that his case comes within the second branch of (1) or, failing that, under (3).

Petitioner suggested below that the FBI investigation of the financing of the Ace investment was triggered by Moore's last appearance before the grand jury on October 24, 1961. The prosecutor then asked what Moore had meant by having answered to one of the grand jurors that Dr. Erdman was "a mystery man." Moore's reply was that Erdman sometimes seemed "magnanimous" and sometimes "hungry and avaricious." Amplifying the latter, he said that Erdman had "been lending Gabe [Forman] money trying to get control" of Ace and that as to "the whole transaction, the $35,000, I can't actually pin it on him and I don't want to say he has any of the money but—there has been a few occasions, I can't recall off-hand, that gave me that impression." Moore was also asked, "Do you think the Doctor kept some of the money?," and responded, "I don't know. I don't want to say because it would only be an assumption. I really don't know. . . ." Earlier, on July 17, 1961, Forman had testified before the grand jury concerning his May 4 meeting with Dr. Erdman at Ace:

> I sat down with Dr. Erdman and I told him, I said the most important thing now is this money that he took

> and he didn't go through with the deal, and he should return the money, and I felt that he took the money . . . I told him that I'd like him to return the money. He said, well, he didn't have all the money available now, that he would give me five thousand dollars and a note for thirty thousand dollars.

A July 5, 1961 statement given by Moore to the FBI stated:

> FORMAN advised me that he inquired of ERDMAN as to the disposition of the original $35,000 in cash, and he, ERDMAN, stated that the money had been given to different people, and that he, ERDMAN, could account to GABE for the disposition of the $35,000. ERDMAN is said to have added that if he did account for the $35,000, he, FORMAN, would have to apologize. Since that occasion, FORMAN has been in contact with ERDMAN on several occasions at which time ERDMAN continues to make the representation that he would account for the disposition of the original $35,000, but as yet has not done so.[6]

And a memorandum dated November 22, 1961 from Hundley to Attorney General Robert Kennedy stated, in discussing whether Keogh should be prosecuted as well as Kahaner:

> Erdman is an enigma and on cross-examination will be vulnerable because of his extra-professional interests in a slot machine company, psychiatric treatment and his penchant for fixing cases for "kicks." Unless, however, we are able to establish that Erdman kept the pay-off money which we cannot at this time, it will be most difficult to try the case without Keogh as a defendant. It's all pretty much the same ball of wax; the facts against Keogh would come out at any trial

[6] Forman's grand jury testimony and Moore's statement were made available to the defense at trial.

and it would certainly complicate matters to try and convince a jury that Erdman was telling the truth about Kahaner and not Keogh.

It is against this background that we must endeavor to place ourselves in the position of the prosecutor when he received the FBI reports of January 24 and February 26, 1962, these being respectively of 30 and 12 typewritten pages. On their face they showed that Erdman had paid for his one-third share of Ace with three checks. Two of them, a personal check for $6,917 and a check of Jerome Edelman, a lawyer, for $6,000—allegedly a loan, had been delivered on April 28, 1961 to Becker, the lawyer for the investors; the third was a personal check dated April 14 for $3,750 that had been issued directly to Ace.[7] They also revealed that Forman had paid for his own and Moore's share with a check on his newly opened account at the Meadow Brook National Bank, made good in the peculiar manner we have stated, and that Forman had been advised by his attorney not to discuss the matter with the FBI. With the advantage of hindsight, one might jump to the conclusion that Hundley should have realized that this information could have given some support to a defense theory that Erdman had kept the bribe money until forced to return it in May, and that he was therefore guilty of "deliberate suppression." But such a judgment would be altogether too severe. While the material we have summarized indicates that Hundley did anticipate a defense theory that Erdman kept some or all of the bribe money, a report showing that Erdman had paid for his share of the Act investment by checks, two his own and the third a loan from Edelman, had no substantial tendency to establish this. Indeed, as counsel for petitioner concedes, "[t]he FBI report indicates that the questionable funds

[7] At the trial Erdman offered to counsel for Kahaner to produce the checks covering his investment in the Ace transaction but the offer was not accepted.

were put up by Moore and Forman, not Erdman." At the time he received the FBI reports, Hundley had no reason to anticipate that the defense would suggest that rather than keeping the money for his own benefit, Erdman had returned most of it to Moore and Forman. The pre-trial statements indicated at most that Moore and Forman had some question in their minds whether Erdman had kept the money; they would have had no such question if Erdman had returned it to them. To hold that at this stage Hundley should have anticipated every conceivable defense strategy that could have been constructed from a few scattered remarks in a voluminous pre-trial record would be to shut our eyes to the realities of pre-trial preparation. We thus cannot fault Hundley for failing to turn over the reports before the trial began, since they gave little support to the defense theory noted above and the prosecution cannot be held responsible for not anticipating the one now suggested.

The focus then shifts to the trial itself. Kahaner's counsel cross-examined Moore with respect to his and Forman's investment in Ace; we set this forth in the margin.[8] Fur-

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[8] Q. In what form did you make the investment; was it by check or cash? A. We gave them a check for thirty—

Q. Wait a minute. You gave a check, you say? A. Yes.

Q. Whose check did you give the Ace Company? A. I believe Mr. Forman wrote his own check.

Q. Whose check did you give the Ace Company? Forman's check or your own check? O. I don't recall.

Q. Did you have any checking account at the time you made the investment? A. I don't believe my check—

Q. Did you have any checking account at the time you made the investment in Ace? A. I had this All-Type—

Q. Please answer my question. Did you have a checking account, Sandy Moore, Sanford Moore? A. No, I didn't have one. If I had, there wasn't any money in it.

Q. You were having this bankruptcy difficulty? A. I had judgments on my name.

Q. Judgments against you? A. That's right.

ther cross-examination of Moore by Keogh's counsel on this subject added nothing as to the source of the funds for the Ace investment, although it rather clearly demonstrated counsel's awareness of the $34,000 check to Ace. Forman testified, on direct examination, that at a meeting around that time in Baltimore, he told Dr. Erdman that he "wanted

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Q. But certainly this other company that succeeded Gibraltor, that had no $17,000 in its account, did it? A. No, sir.

Q. So that you put up no money that could be traceable to you or no check that could be traceable to you in this business venture in the purchasing of an interest in the Ace Company of Maryland; is that correct? A. I got the money from the bank.

Q. You got the money from the bank? A. Yes, sir.

Q. What bank? A. Meadowbrook National Bank in Woodmere.

Q. Who made the application for the loan. A. It wasn't a loan. Mr. Forman sent the money from england.

Q. I didn't ask you that Mr. Moore. Mr. Forman put up the money for you; is that what you are telling us? A. He sent back my money, yes.

Q. Did Mr. Forman send you, Sanford Moore, money? A. That's right.

Q. And he sent it through the bank? A. Yes, sir.

Q. Did you receive any sort of evidence of the fact that the money was there in your name? A. Yes, sir.

Q. What did you get? A. I got a bank check from the bank.

Q. From the bank? A. From a bank in England to the bank, the Meadowbrook, in my name, and I cashed it immediately so that no creditor could take it.

Q. Precisely. That is precisely the point, Mr. Moore. A. Yes.

Q. The investment, however, with the Ace Company was made in Forman's name for himself and you; is that right? A. That's correct.

Q. In other words, your name doesn't appear as being one of the owners of the Ace Company? A. No, sir.

Q. So that the check that you got from Forman, you used in Forman's name; is that right? A. That's correct.

Q. How much was the investment of yours and Forman's, whichever way you want to look at it? A. $17,000 each, $34,000.

Q. How much of an interest in Ace did you get for this $34,000? A. We had, Forman and myself, two-thirds of one-half of the corporation.

the money back for Sandy [Moore] that we gave him because he [Erdman] didn't deliver what he was supposed to"; that Erdman agreed to return the money but said he could do no better at that time than give $5000 in cash and a $30,000 note; and that on Forman's expressing dissatisfaction Erdman sought more time and promised to "work it out." Forman went on to testify that on one occasion when he sought the return of the money, Erdman said that "he had given most of the money of the judge and gave some of it to Kahaner" and that he was going to seek further help from the judge. In his lengthy cross-examination of Forman, Keogh's counsel, rather than pursuing Forman's direct testimony in an effort to show that he had secured reimbursement of the bribe money, pressed him hard in a not ineffective endeavor to show that Forman had charged Erdman with having kept the $35,000 and therefore was morally bound to indorse the $50,000 of notes given by Moore in the "restitution" phase of the conspiracy, see 317 F.2d at 466-67, 476-77; we quote the relevant cross-examination in the margin.[9] This was valuable testimony

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[9] Q. Actually, you told Erdman he was a liar, didn't you? A. Yes.

Q. Didn't you? A. Yes, in discussion.

Q. You told him he was a crook and a cheat, cheated Moore out of $35,000? A. Yes, at one time I did. I had a discussion.

Q. That's right, And you told him in plain and simple words you thought that $35,000 ought to come back? A. Yes, that's right.

Q. To Moore? A. That's right.

Q. And Erdman said "I will give you $5,000 in cash or a check and a note for $30,000"? A. Right.

Q. Is that right? A. That's right.

Q. And it was that $35,000 that you were insisting he endorse the notes for the $50,000 for the so-called restitution; isn't that right? A. Yes, sir.

Q. And that is the same thing, wasn't it? A. Right.

Q. In other words, Erdman having stolen the money from Moore, you insisted that he endorse these notes?

Mr. Hundley: I object to that question.

since it linked with the defense's most telling pieces of evidence to support its theory that Erdman had kept the bribe money, to wit, the testimony of the bankruptcy trustee of Moore's company concerning a statement by Erdman "that he had security of $35,000" for the $50,000 of notes he had indorsed and Erdman's letter of July 13, 1961, to the same effect. See 317 F.2d at 476-77.

With the defense having taken this tack and also having eschewed such obvious questions of Moore and Forman as on what bank was the check to Ace drawn, what was the amount of the bank check from England, and when was it sent, see also fn. 9, *supra,* we find it impossible to conclude that the "high value" of the February 26, 1962 report

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The Court: Objection sustained.

Q. If I say that is what you told Erdman, didn't you, isn't that correct? A. I thought he had taken the money.

Q. Since he took the money from him—

Mr. Hundley: Let him finish.

Q. Have I stopped you from finishing? A. I told him I wanted that money back.

Q. That he was making good the $35,000 by endorsing the notes; isn't that right, this restitution? A. It could be.

Q. As a matter of fact, the last time you were asked a question that I can find, didn't you say on July 6th in words or substance that you had been in constant communication with Erdman up to July 6th and you were never able to get from him a satisfactory explanation of what he had done with that $35,000; is that right? A. That's right.

Q. And it is true today, isn't it, right up to now? Isn't that so? A. Right.

He also questioned Forman about the Ace investment; his suggestion that the bribe moneys sent over from England had found their way into Ace through the investment was met by a flat denial:

Q. Isn't that where the 33,500 that went to Ace come from? A. No, that is not where that came from, no.

Instead of continuing this line of inquiry with the rather obvious query "where did the money come from," Singer went on to a different matter. Counsel could well have thought it better to leave matters as they stood, rather than risk an unequivocal response conceding the precise source of the funds.

"to the defense could not have escaped the prosecutor's attention," 391 F.2d at 147, particularly since there is no evidence the prosecutors had looked at it in the intervening three months. As we said in that opinion, *id.*:

> Any lawyer who has prepared and conducted a trial like this one, lasting 23 trial days, knows how easy it is to forget items in his files that an unexpected turn in the evidence has made helpful to his own case, let alone those that might aid his opponents—something which, under our adversary system, is not exactly in the forefront of his mind.

If petitioner is to prevail, he must therefore bring his case within the third category, 391 F.2d at 147, "where the suppression was not deliberate in either of the senses we have included and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use," with the attendant higher standards of materiality, particularly in *coram nobis*. Despite some surface plausibility in the contention that the defense would have been materially aided by knowledge that Moore and Forman had $33,500 in bills ranging from $100 to $10 in May, 1961, analysis convinces us that Judge Weinfeld was correct in concluding that this would not have created a reasonable doubt of petitioner's guilt in the mind of a juror who was otherwise satisfied—even if we assume the applicable test in *coram nobis* to be no higher than that, see 391 F.2d at 148.

In the first place, any suggestion by the defense that the cash deposits of May 5, 1961, represented a return of the bribe money would have met with vigorous denial on the part of the only three persons having knowledge of the facts—Erdman, Forman and Moore.[10] Forman's testimony

[10] Keogh's counsel has asked us to consider testimony on the subject given by Moore in the disbarment proceedings in December 1970. While we could hardly do this for purposes of reversing

that he continued to question Erdman about the money after May 5 and that up to July 6 and indeed "right up to now" (at the trial) Forman was never able to get a satisfactory explanation of what Erdman had done with the money would have been particularly hard to overcome. But even if the jury had chosen to disbelieve all three witnesses and infer that nevertheless the $33,500 came from Erdman, it is by no means clear that this would have worked in Keogh's favor. In view of Forman's testimony that on the very day before the deposit, Erdman had said he could do no better than pay $5,000 in cash and deliver a $30,000 note and had remarked on one occasion about seeking help from the judge, if the jury had accepted that the immediate source of the $33,500 in bills was Erdman,

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the district court, which had no opportunity to hear this, we will honor counsel's request since, in our view, the net effect of the material is to sustain the district judge. Moore testified that in late April 1961, he went down to Glen Burnie, Maryland, to complete the Ace deal, and then signed a check for $33,332.66 drawn on the Meadow Brook National Bank using Forman's name, since he had received assurances from Forman that the latter was flying home from London and would bring the money to meet the check. On May 5, after Forman's return from England, Moore and Forman went to the Meadow Brook National Bank to make a cash deposit to cover the check; the deposit of $33,500 consisted of $20,000 which Forman had with him and of $13,350 which Moore obtained by cashing a check (or perhaps several) on one (or perhaps several) of his corporate accounts at the same bank; the source of this was a bank check which Forman had sent to Moore a few weeks before; Moore was never physically handed the $13,350 in cash. After being confronted with the excerpts of his trial testimony quoted above, he denied there was any inconsistency. When shown a statement of Forman at trial to the effect that Forman had not brought any money back with him from England, Moore claimed that the cash Forman brought to the bank came from one of Forman's American accounts to which he had been sending money from England. He was also confronted with an affidavit prepared for the Internal Revenue Service in 1965, in which he said:

> At the end of April 1961, Forman opened a checking account by mail at the Meadowbrook National Bank and I de-

it might well have inferred also that the ultimate source of the bulk of the money could have been Keogh. This would have been damaging in the last degree since, among other things, it would have destroyed the defense's strong reliance on the Government's inability to trace what Keogh or Kahaner had done with the money allegedly received. Moreover, in an attempt to attain a goal so difficult to reach and thus so fraught with danger if achieved, a successful effort to develop that the $33,500 represented a return of the bribe money would have impaired the defense's most solid argument for the theory that Erdman had always kept this. If Erdman had returned the bribe money, what reason would there have been for him to indorse Moore's dubious $50,000 notes to the trustee in

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posited $33,350.00 into this account on May 5, 1961. The deposit slip shows that this amount was in currency. Actually, immediately before this deposit, I cashed at the same bank two checks issued by Machinery Imports, Ltd. payable to me and drawn on an English bank. These checks totalled approximately $20,000.00. These checks represented the return to me of funds I had invested in Machinery Imports, Ltd. I added $1,350.00 in currency which I had withdrawn from the Charcoal Pit Restaurant which I then owned. Forman loaned me $12,000.00 in currency which he had personally borrowed from the attorney for Mills Bell-O-Matic.

Moore claimed that he now was not sure whether Forman had brought $20,000 in cash or whether the $20,000 derived from checks issued by Machinery Imports, Ltd.

> So maybe he didn't have it in his pocket bulging out. I don't know. I can't recall whether the bank cashed the bank check or he gave me cash, but I know he put in twenty thousand. And the twelve thousand we had gotten back from New York from an attorney who handled the Mills Bell-O-Matic franchise which I had forgotten about . . . I cant remember everything.

While we agree with counsel that Moore's various versions are not wholly consistent, that is not too surprising after the lapse of nine years and it would be a long jump to infer from any of them that the true source of the $33,500 was Erdman.

bankruptcy?[11] And how, on the hypothesis of a return, could the defense have made the effective use it did of Erdman's oral and written statements to the trustee that he had security of $35,000? To ask the jury to believe that, despite all the contrary evidence, Forman had forced Erdman *both* to repay $33,500, *and* to indorse $50,000 in notes, with some arrangement whereby Forman and Moore would indemnify him to the extent of $35,000, particularly with the risk we have noted of attribution of a large part of the $33,500 to Keogh, would have been a far less effective tactic than the one followed in Mr. Singer's cross-examination of Forman, see n. 9, and in the summation. This was that it was because Erdman had *kept* the money that Moore and Forman were able to press him into indorsing the $50,000 of notes.[12] With the defense having made this wise

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[11] Petitioner endeavors to answer this by contending that "if the payment to Forman were anything else than unconditional, i.e., if it was a loan as Moore had at one time testified, then the pressure would still have been on Erdman to do something else for Moore, such as signing the restitution notes as guarantor." For the jury to accept this would have required them not only to reject Forman's testimony that he never could ascertain what Erdman had done with the bribe money but to believe that, after insisting on its return because of Erdman's non-performance, Forman had agreed to receive it merely as a loan to Moore.

[12] We are not suggesting that counsel is under any obligation to urge only consistent theories of defense. Within the limits permitted by the evidence or any rational inferences therefrom, counsel is free to take any tack, however inconsistent it may be with his other lines of defense, which he thinks may raise a reasonable doubt of the defendant's guilt. On the other hand, in endeavoring to determine after the event whether evidence could have been put "to not significant use," a court cannot assume that counsel would deliberately have undercut a stronger theory of defense by pressing a less persuasive and inconsistent one, and certainly cannot expect the prosecution to have anticipated such a course.

tactical choice [13] and having failed to propound questions of Moore and Forman about the Ace investment that obviously must have occurred to such "diligent defenders," see *United States* v. *Soblen*, 301 F.2d 236, 242 (2 Cir.), *cert. denied*, 370 U.S. 944 (1962), as counsel for Keogh and Kahaner, we see no sufficient basis for invalidating the conviction because of failure to turn over the February 26 or January 24 reports.

The only other point raised in regard to the FBI reports that is worth noting is the claim that disclosure that Forman appeared to have written a check dated April 28, 1961, would have weakened the Government's evidence that, as shown by his passport and other proof, he did not return to this country from England until April 30, and would thereby have repelled the attack on Keogh's testimony that Foreman had accompanied Erdman and Moore in their visit to his chambers on March 29. Quite apart from possible predating of the check, this, as Judge Weinfeld observed, is "a giant leap backward." Moreover, we now know from Moore's testimony in the disbarment proceeding, see fn. 10, that the riposte to any argument based on the date of the check would have been that Moore signed Forman's name on the April 28 check in anticipation of Forman's early arrival.

When all is said and done, the case in essence stands no differently than when we sustained Keogh's conviction, after heavy attack, eight years ago. See 317 F.2d at 485. If the jury believed Moore and Erdman, the Government's proof was overwhelming; if they did not and accepted Keogh's and Kahaner's denials, they would have acquitted.

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[13] Doubtless this is what Judge Weinfeld had in mind when he characterized Mr. Singer's affidavit as "being significant for what it does not say." Suggestion that Erdman had returned the money to Moore and Forman would also have been inconsistent with the alternative theory of Keogh's counsel, namely, that the bribe money had never been raised at all. See 317 F.2d at 476.

Had the Government failed to turn over evidence it had reason to know would discredit either of its two chief witnesses in a significant way, relief should indeed be granted. On its face the February 26 report had no such effect. Rather it confirmed Moore's testimony on cross-examination that his and Forman's Ace investment had been paid by a check covered by a cash deposit and dispelled the suggestion that Erdman had used part of the cash Moore had delivered to pay for his share. It is asking too much of the prosecution to anticipate a theory of defense that the cash constituted a repayment of the bribe money by Erdman, especially when the defense, having been alerted to the possibility of making point by Moore's and Forman's testimony, declined the gambit and adhered to the contrary position—supported by the very testimony of Forman which, on the present theory, the jury would have had to reject, to wit, that he suspected Erdman had kept all or most of the money. Mindful as we are of the earnestness with which petitioner asserts his innocence and the peculiar seriousness of the conviction to him, we are satisfied the time for finality has come. He has had one evidentiary hearing in *coram nobis* and an opportunity for a second, as well as extensive consideration of many other points on which no such hearing was found to be warranted. The disbarment hearing, in which the New York Court of Appeals has afforded him a broad opportunity to relitigate the issue of his guilt, is still open. If he should obtain a favorable result in that proceeding, other methods for attempting to erase his federal conviction will be available to him. Our review of the record convinces us that he would gain nothing by our directing an evidentiary hearing on the instant petition even if we were now to entertain a request for such a hearing not made before the district court.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Opinion and Order of Weinfeld, D. J.

This is a second application for a writ of error coram nobis by James Vincent Keogh, who, together with Elliott Kahaner and Antonio Corallo, was convicted in June, 1962, after a "long trial with many witnesses and much documentary evidence,"[1] of conspiracy to obstruct the due administration of justice in a corrupt endeavor to influence a criminal proceeding in the United States District Court, Eastern District of New York. On direct appeal, the conviction was affirmed.[2] Petitioner's first coram nobis application in June, 1967, after service of his sentence and expiration of his parole, charged that the prosecution in numerous instances had knowingly suppressed exculpatory evidence and used perjured testimony upon the trial. It was denied without a hearing,[3] and the Court of Appeals affirmed in every respect save one, as to which it ordered an evidentiary hearing.[4] Following a hearing upon that single allegation of suppression of exculpatory evidence, which related to four bank deposits by Dr. Erdman, the government's principal witness, this court dismissed the writ once more in its entirety.[5] The Court of Appeals affirmed in all respects as to the four items, without prejudice to the filing of a new petition as to two new matters which petitioner sought to raise on appeal, but which had not been included in the original remand for an evidentiary hearing.[6] Petitioner, seven months thereafter, presented

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[1] United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968).

[2] United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

[3] United States v. Keogh, 271 F. Supp. 1002 (S.D.N.Y. 1967).

[4] 391 F.2d 138 (2d Cir. 1968).

[5] United States v. Keogh, 289 F. Supp. 265 (S.D.N.Y. 1968).

[6] 417 F.2d 885 (2d Cir. 1969).

this petition for a writ of error coram nobis with respect to the items noted by the Court of Appeals. Familiarity is assumed with respect to the prior proceedings.

Petitioner alleges that the prosecution wrongfully withheld three FBI investigative reports—one concerning the finances of Dr. Erdman and his wife, and two concerning the Ace Manufacturing Company—which he contends contain exculpatory material, and that as a result he was denied his constitutionally guaranteed right to a fair trial. To put the matter in focus, it should be noted that the reports are not "exculpatory" in the sense that any material contained therein exonerates him of wrongdoing; rather, essentially the claim is that had the information contained in those reports been available to him at the time of trial, it would have substantially aided his denial that he had received any bribe moneys and corroborated his defense that Erdman himself retained or otherwise availed himself of those moneys.

Upon the argument of this motion, petitioner's counsel took the position that no evidentiary hearing was necessary and urged that the judgment of conviction be voided solely upon the papers submitted in support of the application. The government was also of the view that no hearing was required, but, contrariwise, urged that the petition for the writ be dismissed for lack of evidential support. Accordingly, petitioner's claims will be decided upon the moving papers, the files, and the trial and hearing records of the case without regard to any new matter presented in the government's answering affidavits.[7] The moving papers

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[7] *See* United States v. Keogh, 391 F.2d 138, 149 (2d Cir. 1968); *cf.* United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969); 28 U.S.C. § 2255. The government submitted the affidavits of Hundley and Lally, the chief trial prosecutors, each of whom testified upon the prior coram nobis application. Each avers he has no recollection of having seen the February 26, 1962 report in preparation for trial and that he did not in any way conceal or attempt to conceal or suppress the report or any information to which defense might have been entitled.

now consist of affidavits by petitioner and by his present attorney, which set forth petitioner's contentions, attached exhibits and an affidavit by his trial attorney, which contains the only new evidential matter presented on this application. No affidavit by any other affiant has been offered to substantiate the charges which, the Court of Appeals observed, to be sustained, must meet "the criteria laid down in our last opinion, 391 F.2d 146-48, and in United States v. Miller, 2 Cir., 411 F.2d 825, 830, 832 (1969)."

I. The report of November 28, 1961.

This report, which related to the finances of the Erdmans, was the subject of the evidentiary hearing on the remand of petitioner's prior application. The remand was limited to the single issue of four bank deposits in February, 1961, totalling $15,539.94, which the report stated could not be identified as to source. The petitioner contended that the report had been deliberately suppressed by the prosecution, and since the unexplained deposits equalled "the total amount of the bribe alleged to have been paid to Erdman in February 1961," this was exculpatory evidence that could have been used to establish that Erdman kept the bribe money. At that hearing, the Erdmans testified, as did the prosecuting attorneys, the FBI agent in charge of the investigation and others who corroborated the Erdmans' explanations. This court concluded that the evidence demonstrated that each of the four deposits derived from an innocent source; that had the report been available to petitioner before or during the trial, it would have been of no aid in furtherance of petitioner's defense, and finally, that the government attorneys were entirely without motivation in failing to turn over the report to the defense.[8]

Petitioner's present claim centers about testimony developed during the course of that hearing. He urges that had be been aware of the evidence which the government

[8] 289 F. Supp. at 269-71.

advanced to establish the innocent source of the four deposits, he would have been able to offer a new line of defense and to raise a reasonable doubt of his guilt. It appeared that Mrs. Erdman had a checking account and a safe deposit box in the Meadow Brook National Bank in Woodmere, Long Island; that on February 16, 1961, she redeemed $7,754.18 worth of United States Savings Bonds which she had inherited from her father; that the proceeds were deposited at the bank and drawn upon to pay $7,500 to her mother on account of a loan; that, requiring immediate funds because of an unexpected opportunity to purchase a house, she obtained repayment from her mother of the $7,500 by check, one of the four deposits; that on June 28, 1961, Mrs. Erdman purchased $15,175 face amount United States Savings Bonds,[9] and on June 29 closed out her safe deposit box. Petitioner contends that the existence of the safe deposit box, which was testified to during inquiry with respect to the $7,500 check transaction, was "previously unrevealed," and asserts that the records at hearing indicated that "the Erdmans had no money available to make that purchase [of bonds in June] other than bribe money." From this, petitioner argues that if such information had been available upon the trial, he could have urged a new line of defense: "[T]hat Erdman had given the bribe money to his wife to secrete in her safe deposit vault; that thereafter, in immediate need of money for the payment of current obligations, he had his wife, with whom he was having marital difficulties, redeem her United States Savings Bonds which she had inherited from her father twenty years before and put money into circulation through the indirect route of his mother-in-law, Mrs. Wexler; that when Moore gave a statement to the FBI revealing the

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[9] This almost certainly was the face amount of the bonds for which the purchase price would be $11,381.25. If the $15,175 represented the purchase price, the face amount would be $20,233.33, whereas United States Savings Bonds are not issued in such denominations.

alleged 'fix,' Erdman had his wife take the money out of the vault, close it, and then she used the money to replace the bonds she had previously sold by making the bond purchase of June 28.'"[10] There is not a single evidential fact to support this hypothetical projection.

At the outset, a number of observations are in order. Although petitioner repeats his assertion made at the last hearing that "the Erdmans had no money available to make that purchase," the record is to the contrary. This court has previously found that Erdman's annual professional income alone was $150,000, and that he was a man of substance;[11] also, it appears that Mr. Erdman was not without substance in her own right. Further, petitioner's claim of a "previously unrevealed safe deposit box" is incomplete. At the conclusion of the last hearing, petitioner contended that it was only as a result of that hearing with respect to the November 28 report that he "discovered" Mrs. Erdman had both a bank account and a safe deposit box at the Meadowbrook bank, which led to the information that she purchased government bonds in June 1961. His charge of the alleged discovery of the bank account was belied by the trial record. Petitioner's trial counsel, in cross-examining Dr. Erdman with respect to bank accounts, asked: "How about an account out in Long Island at the Meadow Brook National Bank?", in response to which Dr. Erdman testified that his wife had an account there and, interestingly enough, in the light of the current charge with respect to the safe deposit box, added: ". . . I think there was a carry-over from when we moved. We did not, you know, take it out."[12] No question was asked and no mention was made of a safe deposit box. Aware of Mrs. Erdman's account at the Meadow Brook National Bank and alert to the significance of safe deposit boxes, including those of a

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[10] Keogh affidavit, pp. 4-5.

[11] 271 F. Supp. at 1012.

[12] SM 755-56. ("SM" refers to the trial transcript; "SMH" refers to the hearing transcript.)

spouse,[13] it is incredible that diligent counsel, had he deemed this of any significance in aid of the defense, would not have pursued the inquiry as to safe deposit boxes in Mrs. Erdman's name. Inquiry at the bank or the issuance of a subpoena for all its records pertaining to Mrs. Erdman would have readily disclosed the existence of the box. Petitioner cannot complain that he was denied a fair trial by the nondisclosure of information which was "readily available to a diligent defender."[14]

Finally, no claim is made, nor can one be made, that the government had knowledge of the safe deposit box or the bond purchases at the time of trial, which forecloses any contention that the government deliberately suppressed this information. The information came to light in connection with the extended inquiry concerning the bank deposits set forth in the November 28 report, and in fact bore only a tenuous connection with that inquiry.[15]

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[13] *See* SM 3162.

[14] United States v. Soblen, 301 F.2d 236, 242 (2d Cir.), cert. denied, 370 U.S. 944 (1962); see also Rosenberg v. United States, 360 U.S. 367 (1959).

[15] The manner in which the bond purchases came to light is of some significance in this regard. The initial inquiry concerned the source of an unidentified $7,500 check deposit into the Erdman account at the Chemical Bank. This was the return by Mrs. Erdman's mother of a repayment of like amount by Mrs. Erdman on account of a loan. The inquiry then shifted to the source of the funds used to repay the mother. Those were found to have some from the redemption of government bonds by Mrs. Erdman and inherited from her father. The bond redemptions were effected through Mrs. Erdman's account at the Meadow Brook bank. At that point, the original hearing was closed, except for the limited purpose of receiving additional testimony of Meadow Brook bank officials as to February 1961 deposits in Mrs. Erdman's account and her bond redemption records which they had not been able to locate at the time their original testimony, SMH 1009; United States v. Keogh, 289 F. Supp. at 268. In disregard of the court's ruling, petitioner sought to broaden the inquiry beyond the scope of the remand and sought other records at the Meadow Brook bank, in-

As to the materiality of the allegedly withheld matter, its exculpatory value to the defense, the theory ultimately advanced here is no more than pure speculation, without the slightest basis or support in the record. The mere fact that a wife has a safe deposit box regularly maintained by her (opened in May, 1959), that her husband possessed bribe moneys in February, 1961, that four months later, on June 28, she purchased $15,175 face value government bonds, a not unusual purchase for her, and the next day closed the box (which was far removed from her then home),[16] would not, without more, permit the imaginative

cluding any safe deposit box, although neither Dr. Erdman nor Mrs. Erdman had been asked about or mentioned a safe deposit box in connection with the bonds or otherwise, SMH 942-43. When a Meadow Brook official returned to report on a continued search to locate the records, he testified that Mrs. Erdman maintained a safe deposit box there, SMH 946. Petitioner's attempt to go beyond the remand extended to an inquiry to bond purchases in February, March or April, 1961, and then in June 1961, as well, although no mention whatsoever had been made of bond purchases. Although holding that these matters were not within the scope of the remand, the court, to conclude the matter, telephonically obtained from government officials information that Mrs. Erdman had purchased in February, 1961, two $175 bonds and on June 28, 1961, made two bond purchases, one totalling $7,125 and the other $8,050; this information was passed on by the court to petitioner, SMH 964; 1009-13. Realistically, then, the discovery of the bond purchases was not triggered by the November 28, 1961, report, but by reference to savings bonds when the inquiry was focused upon and limited to alleged "unexplained" bank deposits or alleged concealment of moneys. Such an inferential connection could just as well have been made at any time, including during the trial, when petitioner knew of Mrs. Erdman's Meadow Brook bank account, without regard to an FBI report or an evidentiary hearing.

[16]Although the Erdmans moved from Great Neck, Long Island, in September, 1960, to Riverdale, New York, Mrs. Erdman continued to maintain her account at the Meadow Brook bank at Great Neck, Long Island. She issued the check drawn on the Meadow Brook bank to her mother in February, 1961. United States v. Keogh, 289 F. Supp. 265, 267 (S.D.N.Y. 1968).

inference urged by petitioner that the bribe money was not paid to petitioner but was cached by Erdman in his wife's box and was later used to purchase the bonds to replace those she had earlier sold. It was not shown that at the time of the conspiratorial activities Mrs. Erdman was aware of her husband's role. Mrs. Erdman, an attorney, was not a witness at the trial; she testified at the coram nobis hearing that she did not know that her husband was under investigation in June, 1961; that she had no knowledge that Dr. Erdman handled any of Moore's money; that she never discussed anything about Moore with her husband and knew nothing about Moore until the trial, which started in May, 1962. This court found her an entirely credible witness;[17] her testimony was convincing; her version about redeeming the inherited bonds, attacked by the defense as a "fantastic" story,[18] was eventually corroborated by irrefutable documentary proof under a fortuitous circumstance.[19] It taxes credulity beyond the breaking point to accept, without any evidential support, the claim that a husband who, a petitioner asserts, "was having marital difficulties," entrusted his wife with $35,000 cash bribe money, persuaded her to redeem bonds inherited by her from her father, circulated the bond proceeds through his mother-in-law in a devious way to meet current living expenses, and when the corrupt scheme, of which Mrs. Erdman was unaware, was about to be revealed by a participant she did not even know, withdrew, upon her husband's direction, the cached bribe money to purchase government bonds to replace the previously redeemed bonds. Such an argument is not only conjectural, indeed, it defies common sense.

It is true that the implausibility of a claim does not necessarily deter forensic endeavor, but it is also true, as

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[17] Mrs. Erdman has died since the first coram nobis hearing.

[18] SMH 819-20.

[19] United States v. Keogh, 289 F. Supp. 268 n.8.

so often stated, that jurors do not shed their common sense when they sit in judgment. The test of materiality is not whether petitioner's counsel might have presented still another argument, however fanciful, but whether, in a proceeding such as this, the alleged "undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror. . . ."[20] Other theories advanced at the trial, some of which did have evidential support, planted no reasonable doubt in the mind of a single juror. The present variant, without a shred of evidential support, could have added no weight to the defense. In the light of the fact that defense counsel did argue that Erdman kept the bribe money, it would not even have served to alter trial tactics.

The court is firmly convinced that no conscientious juror would have been swayed by petitioner's latest conjectural and highly improbable theory. In sum, the court concludes that the claimed undisclosed evidence would not have resulted in raising a reasonable doubt of petitioner's guilt in the mind of a single juror; so, too, it raises no doubt in this court's mind.

II. The report of February 26, 1962.

We next consider petitioner's claim with respect to the Ace Manufacturing Company report, which, as the Court of Appeals noted, is inconsistent with the claim centering about Mrs. Erdman's safe deposit box and bond purchases.[21]

When the Court of Appeals declined to pass upon petitioner's claim with respect to the alleged suppression of the February 26, 1962 report, it noted that nothing about it had been developed at the coram nobis hearing; that neither Dr. Erdman nor the prosecutor had been examined on the

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[20] 391 F.2d at 148.

[21] 417 F.2d 885, 889 n.6 (2d Cir. 1969).

subject and no attempt had been made to obtain the testimony of Forman or Moore. None of the aforesaid persons has been examined, nor any affidavit been submitted from any one of them.[22] Thus, with the exception of Mr. Singer's affidavit, hereafter discussed, the record remains in the same posture as when the Court of Appeals found it insufficient upon which to "warrant . . . directing issuance of the writ when the question had not been explored in depth."[23]

At the coram nobis proceeding, or earlier, at the disbarment hearings, an FBI report dated February 26, 1962, which related to investments of Erdman, Moore and Forman in the Ace Manufacturing Company, was made available to petitioner. At the disbarment hearing, another report, dated January 24, 1962,[24] dealing generally with the affairs of the Ace Manufacturing Company, had also been made available. The two reports consist of forty-two single-spaced typewritten pages and reflect the investigations of a number of FBI agents. The February, 1962 report, in summary, relates to a $50,000 investment by Moore and Forman (two-thirds) and Erdman (one-third) for a half interest in Ace Manufacturing Company, a Baltimore concern. It indicates that the bulk of Erdman's share was met on April 28, 1961, by his check for $6,917 and a check of Jerome Edelman, a lawyer, in the sum of $6,000, which were received on that day by attorney George Becker, who acted for the investors;[25] also, that Erdman had issued a check

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[22] Except the affidavits of Hundley and Lally, *see* n.7 *supra*.

[23] 417 F.2d at 889.

[24] Also a report of October 17, 1961, n.53 *infra*.

[25] Erdman testified as to his investment and offered to produce for defense counsel his checks, which he suggested could give precise dates, SM 637-38. The offer was not accepted. Also, on cross-examination by Singer, Erdman testified a lawyer gave him "about $6,000" in the form of a loan, which he used as part of his Ace investment, SM 1061-63.

in the sum of $3,750 directly to Ace on April 14.[26] The Moore-Forman investment was by check payable to Gerald Topper in the sum of $33,332.66 dated April 28, 1961, bore the name of Gabe Forman, and was drawn on the Meadow Brook National Bank, where an account, "introduced by S. Moore," had been opened on May 2 with a $100 deposit. The check was received at the bank on May 4 and was paid the following day against a cash deposit of $33,350 in denominations of 10, 20, 50 and 100 dollar bills. The report further states that Forman's attorney had notified the FBI that he had advised Forman not to discuss the matter with the FBI.

The Ace investment had been probed into upon the trial upon a theory, one of a number as to what happened to the bribe money, that the bribe money had found its way there. The defnse had tried to link this theory to Erdman's statement to the bankruptcy trustee of Moore's company, Gibraltar Amusements, Ltd., that with respect to his endorsement of $50,000 in restitution notes, he had security of $35,000,[27] and his explanation upon the trial of his statement. The petitioner now asserts that "the prosecutor's failure to turn over the February 26 FBI report was the result of deliberate suppression" and that the information as to the deposit of $33,350 in small bills in a recently opened account in the name of Gabe Forman, had it been turned over at or prior to the trial, would have served to corroborate petitioner's claim that Erdman had never given him any of the bribe money; also it would have been of value to support a claim that "even if the money had been paid to Erdman" for bribe purposes, Erdman had returned it to Forman and Moore in the form of the Ace investment.

Preliminary findings are in order. There is upon this record not a scintilla of evidential support for petitioner's

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[26] This check, Erdman testified, was delivered to Lawrence, the president of Ace, SM 625a, 637.

[27] In a letter to the trustee, he stated, "I am security for the first $35,000.00 . . ."

charge that the alleged failure of the prosecution to turn over the February 26 and the January 24, 1962 reports, was "the result of deliberate suppression" by the prosecutor.[28] Equally important, it has not been adequately established that in fact those reports were not turned over and available to the defense at or before the trial. The guarded affidavit of Henry G. Singer, petitioner's trial counsel, submitted only after the government had noted its omission from the moving papers, states that his "best recollection" is that he did not see the reports at or prior to the trial. He adds that: "Every F.B.I. report or statement which was turned over to me during the original trial was marked for identification." Petitioner submits the clerk's trial minutes which list exhibits introduced in evidence or marked for identification and which do not list the FBI reports of January 24 or February 26, 1962. However, the fact is that although voluminous material was turned over to the defense, including, in addition to Jencks Act statements, reports the government was not obligated to dis-

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[28] Petitioner makes the additional claim that the prosecution was under a duty to turn over the February 26, 1962 report pursuant to the Jencks Act, 18 U.S.C. § 3500 (1964), since it contained a summary of an interview with George Becker, an attorney, which related to the investment closing. At the trial, Becker, under a brief cross-examination by the defense, testified as to his role in the Ace transaction, SM 2055-56. The government, on direct examination, asked no question with respect to Ace. Becker's direct testimony was limited to his representation of Moore and the other defendants in the criminal bankruptcy proceeding, events related thereto, and as to his having been shown by Moore $20,000 stated to be used for the "payoff". The statutory language is clear: "Section 3500 only requires the production of statements relating to a witness' direct testimony". United States v. Mayersohn, 413 F.2d 641, 643 (2d Cir. 1969), *cert. denied*, 397 U.S. 906 (1970). Petitioner's further claim that Becker's direct testimony related to the Ace investment because Becker testified that he saw money claimed to be part of the bribe money, and petitioner's theory was that the bribe money ended up in Ace, merits no further comment.

close,[29] not all such material was noted in the clerk's minutes.[30] The record indicates that some exhibits were not marked for identification until used by the defense on cross-examination,[31] and others were never marked at all, although actually used, in the examination of witnesses. To cite examples: co-conspirator Schwach was cross-examined by Singer with reference to his signed statement of July 4, 1961,[32] and his grand jury testimony;[33] yet, neither was marked for identification; and this was so in the instance of other FBI reports of interviews of Schwach that were turned over to the defense.[34] So, too, Becker, the attorney, was cross-examined on the basis of his grand jury testimony, which had been submitted to the defense under the Jencks Act. But this is nowhere listed in the clerk's minutes.[35] And there were instances when Jencks Act material that was delivered to the defense but not used to cross-examine the witness which do not appear in the clerk's

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[29] *See* 289 F. Supp. at 272. At the coram nobis hearing Hundley testified: "[D]uring the trial we turned over everything that was asked for and some that wasn't". SMH 245; *see also* SMH 224, 282.

[30] The current practice requires the complete listing in the clerk's minutes of all § 3500 material, whether used or not.

[31] During the trial, for example, the following occurred:

> "Mr. Kleinman. I take it that this [statement of Walter Cohen] hasn't been marked, Mr. Hundley?
>
> "Mr. Hundley: As a matter of fact, none of those statements that we turned over have been marked for identification. I want to point that out to the Court.
>
> "Mr. Kleinman: Can we have this one marked for identification?"

SM 1947; *see also* SM 1785.

[32] SM 2146-47.

[33] SM 2147-48.

[34] SM 2145-46.

[35] SM 2001-03.

minutes, as in the case of Judge Rayfiel's statement and his grand jury testimony.[36] Thus, the only support for petitioner's claim that the reports were not turned over to the defense is Singer's carefully guarded statement based upon his "best recollection," the reliability of which is at once challenged by the demonstrated inaccuracy of the remainder of his affidavit as to documents marked for identification. Petitioner has failed to submit any corroborating affidavit on this subject, of his other trial counsel or of other attorneys who represented the co-defendants,[37] or to give any explanation for his failure to do so. The court finds upon this record that petitioner has failed by credible evidence to support his claim that he did not have available at the trial the February 26 and January 24, 1962 reports, or the relevant information contained therein.

But entirely apart from that finding, which alone reques dismissal of the petition, the fact is, whether or not the reports themselves were in the possession of the defense at or before trial, the substance of the relevant information contained therein was either fully developed at the trial

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[36] Judge Rayfiel testified before the grand jury on September 21, 1961, and his interview by the FBI on August 16 was recorded in Agent Young's report on August 23, 1961.

See Mr. Singer's statement: ". . . I have read the testimony of Judge Rayfiel, who is going to be called as a witness, and every other witness whose testimony I have . . ." SM 2169.

At the disbarment hearing, petitioner's present counsel, who did not participate in the trial, denied that Judge Rayfiel's statement of August 16 had been produced at the trial. But attorney William Kleinman, who represented Kahaner, responded to the referee's inquiry: "I have a hazy recollection that, in advance of Judge Rayfiel's testifying, sort of as a matter of course Mr. Hundley used to hand us, or—I was more concerned with it at that time—some statements; so I cannot say positively that we were not given the statement, but I know it was not used". Disbarment minutes, 539-40.

[37] William Kleinman, one of the attorneys, who represented co-defendant Kahaner, is deceased.

upon the cross-examination of Moore, Erdman and Forman and hence known to the defense, or was readily available to the defense by further cross-examination or by subpoena. Further, the nature of defense counsel's inquiry suggests they knew much more about the transaction than petitioner reveals on this application.

Moore testified that his and Forman's share of the Ace investment had been sent by Forman from England to him at the Meadow Brook National Bank in the form of a bank check, which, because of his bankruptcy involvement, he immediately cashed so that no creditor could reach it; that the investment was made in Forman's name for both of them; that the check he "got from Forman, [he] used in Forman's name";[38] that as to the check to Ace for the investment, he believed Forman wrote his own check and that he got the money from the Meadow Brook National Bank in Woodmere. Forman testified that his and Moore's investment in Ace was "33 [thousand dollars] and change";[39] he denied that the investment came from the money he sent over in February and March, 1961, totalling $25,000 and $8,500, part of the Kerner loan.[40]

Moore was not cross-examined further as to the cash breakdown or the names of conversion of the bank check to cash, or as to the bank depository. Forman was not cross-examined further as to the source of the investment in Ace, which he denied included the bribe money sent over from England—and there was nothing to stop petitioner's counsel from pursuing these inquiries. Moore's repeated attempts to give more specific details as to the transaction

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[38] SM 1292. Erdman also testified that "because of Moore's bankruptcy troubles the money was to be in Forman's name . . ." SM 643; *see also* Becker's testimony, SM 2056.

[39] SM 2238.

[40] SM 2239. "Mr. Singer: . . . Q. Isn't that where the 33,500 that went to Ace come from? A. No, that is not where that came from, no".

were cut short by the defense.[41] Erdman's offer to produce his checks covering his investment in the Ace transaction and to verify the precise dates was not accepted by his cross-examiner.[42]

The FBI reports, rather than being exculpatory, provided documentary corroboration of those who testified to the Ace transaction. Moreover, this by no means was a case of information in the exclusive control or possession of the prosecution. The information contained in the reports was as much available to the defense as to the prosecution.[43] With respect to the denominations of the bills, all the defense had to do was to follow through on cross-examination or subpoena the Meadow Brook bank records to secure the details as to the breakdown and the Forman account.

Since the defense was aware of the cashing of the check, knew of the Meadow Brook accounts, and did not deem it necessary to make further inquiry, no reason is suggested why government counsel should have noticed or attached significance to it, if they knew or recalled the breakdown of the cash, or the account on which the investment check was drawn, referred to in the lengthy single-spaced report. If information allegedly withheld by the prosecution is nonetheless known to the defense in the course of the trial, or could readily be obtained by diligent counsel, the defense can make no claim of prejudice.[44]

Quite apart from the fact that the substance of the 1962 reports was neither unknown or unknowable to the defense

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[41] SM 1289-90.

[42] SM 637-39.

[43] *See* United States v. Birnbaum, 421 F.2d 993, 996 (2d Cir.), *cert. denied*, 397 U.S. 1044 (1970).

[44] *See* Rosenberg v. United States, 360 U.S. 367, 371 (1959) (Frankfurter, J.); *cf.* United States v. Keogh, 417 F.2d 885, 887 (2d Cir. 1969); United States v. Soblen, 301 F.2d 236 (2d Cir..) *cert. denied*, 370 U.S. 944 (1962).

at the time of trial, the court is of the view that the information could not have been material to the conduct of the defense or the outcome of the trial. In this context, and viewed against the background of defense counsel's inquiry, Singer's affidavit is significant for what it does not say. Singer does not say that he was unaware of the contents of those reports. He does not say that possession of the information allegedly unknown to petitioner at the time of trial, that the cash used to cover the investment check was in small bills, would have affected his trial strategy, his cross-examination, or been of aid to the defense. And this omission is highlighted by the circumstance that Singer, in cross-examining the witness, showed unusual familiarity with the Ace transaction.[45]

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[45] Petitioner also asserts that the information as to the Forman bank account and the deposit therein was not known to the defense at the time of trial. In the light of that claim, which ignores Moore's testimony that he believed Forman's check was given to Ace to cover the investment, that the money came from the Meadow Brook bank in Woodmere, and other details of the transaction, part of Singer's cross-examination of Forman is rather revealing. Singer first suggested that Forman and Moore had put up $35,000 (the exact amount of the bribe money) as their share of the investment in Ace. Forman kept insisting that they had put up only about $33,000, "33 and change", [SM 2238]. Forman was never any more explicit as to the exact amount. Singer then took a slightly different tack, as follows:

> "Q. Well, let's see: If you took the 5,000, the two 10,000's would be 28,000 and 8,500 that Kerner said he drew from the bank, you'd have exactly 33,500?" [SM 2238-39]

After being questioned by the court on his arithmetic, Singer tried again:

> "Q. Let me get the exact figures. 5,000 and two 10's is 25,000; is that right? A. Right.
>
> "Q. And the 8,500 Kerner says he cashed in the bank in three checks, that is 33,500; that is the exact amount within a few dollars of your alleged investment in Ace? . . .

Also significant is the absence of affidavits from Moore, Becker and others having knowledge of the details of the trnsaction and its closing, or any explanation for their omission. That omission takes on added significance, since on petitioner's prior application he secured affidavits apparently without difficulty from Moore, Becker and others. Although this court rejected the attempt of these affiants to attenuate in some respects their trial testimony in an obvious design to aid petitioner,[46] the fact remains they did cooperate with him and furnished the affidavits.[47]

Finally, the theory which petitioner now advances finds no support in the record. In the absence of evidence from any of the participants, Moore, Erdman, Forman and others having knowledge of the facts, it rests upon surmise and conjecture. With the Ace investment situation known to the defense,[48] it was thoroughly probed into in support of petitioner's denial that he had received any of the bribe

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"Q. Isn't that where the 33,500 that went to Ace came from? A. No, that is not where that came from, no". [SM 2238-39]

Moore had testified that he first received $5,000 from England and later an additional $20,000. The remaining $10,000 he said came from a loan from the Esco Trading Company in the form of a check to Kerner (another defendant in the Eastern District prosecution named as a co-conspirator in the present case), who deposited it in his account and then withdrew cash. Although Kerner had testified that he withdrew only $8,500 from the bank, he also testified that he collected an additional $1,500 from his vending machine routes and turned over $10,000, not just $8.500, to Moore. Nonetheless, petitioner now claims that he did not know that the exact amount of the Ace investment of Moore and Forman was $33,332.66, or that the check for that amount was covered by a cash deposit of exactly $33,350.

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[46] United States v. Kahaner, 271 F. Supp. at 1013.

[47] *Cf.* Sobell v. United States, 264 F. Supp. 579, 596 (S.D.N.Y.), *aff'd per curiam*, 378 F.2d 674 (2d Cir. 1967).

[48] Grand jury minutes and statements containing specific references to it were turned over by the government to the defense.

money from Erdman, who, according to one defense theory,[49] had kept the money and later invested it in Ace. Petitioner's basic contention here is that the cash deposit of May 5 could have been used to corroborate his defense by urging upon the jury that "Erdman had in fact given to Forman . . . the $33,350 in cash which Forman deposited in his new account in the Meadow Brook Bank to cover his check to Ace," and that even if the money had been paid to Erdman, "he gave it back to Forman and Moore in the form of the Ace investment." Other than its bare assertion, there is not a scintilla of evidence to support the charge that the cash deposited in the Forman account came from Erdman; the trial record, as already noted, indicates its source to have been otherwise. Petitioner, however, relates the cash deposit on May 5 to Forman's request[50] upon Erdman to return the bribe money because the fix had not been accomplished. The matter, however, cannot be considered in isolation; also relevant is the matter of the restitution plan which, according to the government's

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[49] The defense had various and varied theories as to the disposition of the bribe money—all in denial that any ever reached petitioner or Kahaner. The Kahaner defense had "no doubt" that Erdman got the money from Moore, but that he kept it; also, that it landed in Ace Manufacturing Company and it was "security" for Erdman's endorsement of the restitution notes, a theory generally adopted by the other defendants. The Keogh defense doubted the bribe money had ever been raised, but if so, and Erdman did get the $35,000, it was "right down in Ace"; in the process, however, Erdman and Moore had "got together to cheat" Forman and had "stolen" part from Forman. Now the claim no longer is that Forman was cheated, but that Erdman returned the bribe money to him in the form of the Ace investment. Also, there is the other recently advanced theory that part of the bribe money was used on June 28 by Mrs. Erdman to buy bonds to replace those she had previously redeemed, a theory which flies in the face of the claim of repayment to Forman almost three months before.

[50] Petitioner fixes this day as May 4, in disregard of substantial evidence to the contrary.

evidence, was suggested by Kahaner shortly after the sentence on March 30, 1961, and thereafter furthered by Keogh and others, and which it was charged was an extension of the conspiracy when it failed of its original purpose to secure suspended sentences for Moore and his co-defendants in the Gibraltor Amusements criminal case.

Forman testified that he first met Erdman in early May, a few days after his return to the United States, at which time he asked what was going to happen with the money, and Erdman asked for "a little time and we will work it out"; that about a week later, at the Ace plant in Baltimore, he asked Erdman for the return of the money because "he didn't deliver," and Erdman offered to give back $5,000 cash and a $30,000 note, which was not acceptable, whereupon Erdman again asked for "a little more time." Later, in New York, about the middle of May, there was another discussion about "returning the money," when Erdman said he would arrange for Forman and Moore to see the judge and to ask his help; also, that in one of the conversations Erdman stated, "he had given most of the money to the judge and gave some of it to Kahaner."

Erdman testified he first met Forman in early May upon his return from England; that Forman was disturbed because the fix had not gone through; that he told Forman if he wanted "to ask the judge for the money back," he would arrange for a meeting. Thereafter, at a conference at Keogh's chambers, Forman was introduced to Keogh by Erdman, who urged upon petitioner that he must help Moore, who was also present; however, nothing was then said about the return of money. Erdman further testified that at this conference Keogh expressed the view that with restitution everything would work itself out. There was testimony that at that conference petitioner asked about the importance of Jaspan, the attorney for the trustee, in any restitution settlement, and said he would have the attorney in his office the following week. There was also

testimony of another conference at petitioner's chambers on May 22, again attended by Erdman, Forman and Moore, later joined by Jaspan, at which, among other matters, the proposed restitution agreement was considered, as well as Erdman's endorsement of the notes, without which the trustee would not consent to the proposal. The details of these and other meetings and other pertinent events, petitioner's role with respect to the restitution agreement, culminating in Erdman's endorsement of the notes on May 31, are contained in the record and need not be repeated here.

Foreman testified that it was because the money had not been returned that Erdman had endorsed the $50,000 in restitution notes. Forman further testified that as late as July 6 he had not received a satisfactory explanation from Erdman as to what he had done with the bribe money other than that he had given it to Keogh and Kahaner, and Erdman himself testified that as late as July Forman was pressing for money.

Notwithstanding this and other evidence, petitioner contends that information of the cash deposit in small bills in the Forman account would have supported his denial that he ever received the bribe money. In fact, it would have lent no support whatsoever to that defense. If, as petitioner's present theory runs, Erdman had, by May 5, returned to Forman the bribe moneys, which Forman deposited in the Meadow Brook bank to cover the check to Ace, the demands thereafter upon Erdman for the return of the money are senseless. So, too, if Erdman had made repayment by May 5 and was free from any pressure, there was no reason for him to endorse the restitution notes on May 31. Moreover, if Erdman had returned the money by May 5, after hiding it somewhere for several months, Erdman's implication of Keogh and Kahaner, each of whom acknowledged he was his friend and physician, would be without motivation and entirely inexplicable. It was on the theory that Erdman intended to and did keep the

bribe money that the defense was able to argue to the jury that, "when his iniquity was discovered," Erdman was motivated to involve Keogh and Kahaner in order to allay Forman's suspicion, to protect himself from retaliation, and allegedly "to gain favor with the government."[51] But if Erdman had returned the bribe money by May 5, the basis for this contention evaporates. Having heard Erdman testify that he paid the bribe moneys to Keogh and Kahaner (Moore testified that in Erdman's presence he passed $2,500 of the bribe money to Kahaner), the jury would have had to ask itself, if the money had been repaid by Erdman, as now claimed, by May 5, what possible reason could there have been for him to have concocted a story, to have implicated and to have continued to implicate Keogh and Kahaner, his friends, and in the process to involve himself.

The information which petitioner now deems of significance must be viewed against the totality of all the evidence. What was presented to the jury was a miasma of corrupt conduct in an attempt to fix a case. As to petitioner, in addition to Erdman's testimony that he paid petitioner "fix" money on two occasions, proof was also presented among other matters, that shortly after and on the day of the second payment, petitioner discussed leniency for Moore with Judge Rayfiel at Erdman's request; that Judge Rayfiel indicated that leniency was not merited because Moore was a bad man with a bad record who had committed a serious crime; also there was a rumor that "everything has been taken care of"; that nonetheless thereafter petitioner arranged for Erdman to see Judge Rayfiel before the sentencing; that petitioner saw both Erdman and Moore's attorney with respect to the matter the morning of the sentencing; further, that following the imposition of sentence petitioner's role in the restitution negotiations included talks with Jaspan, the attorney for

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[51] 317 F.2d at 476.

the trustee, then engaged in an unrelated litigation before petitioner; meetings in his chambers, including the summoning of Jaspan to one attended by Moore, Erdman, Forman and petitioner; his advice to Erdman, following the delivery of the restitution agreement and endorsed notes, as to an application for a motion for reduction of the Moore sentence; and other activities of petitioner in the restitution situation. Considered with respect to the evidence of the Ace transaction that was presented to the jury, and against all the trial testimony, the allegedly unknown information pales into insignificance. The fact is that the Moore-Forman Ace investment of thirty-odd thousand dollars was known to the jury, and other significant details of the transaction were before it. The defense theory as to the Ace investment had been extensively urged upon the jury in summation, with heavy emphasis upon the trustee's testimony. The charge that Erdman had kept the money was the focus of a bitter attack upon his credibility. He, Moore and Forman were subjected to as raking a cross-examination as experienced and able counsel could summon in their combined efforts to discredit their testimony.

In the light of all the developed facts of the Moore-Forman investment in Ace, there was no significant chance that added evidence of the currency breakdown, however availed of by the defense, could have induced a conscientious juror to a different vote.[52] The court concludes that that evidence and other matters now relied upon would not have been of material aid to defense, its configuration or its strategy, nor would it have affected the result of the trial. Any other view would be unrealistic.

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[52] United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 146-48 (2d Cir. 1968); cf. United States v. Birnbaum, 421 F.2d 993, 996 (2d Cir.), *cert. denied,* 397 U.S. 1044 (1970); United States v. Acarino, 408 F.2d 512, 516 (2d Cir.), *cert. denied,* 395 U.S. 961 (1969).

Petitioner refers to several other items in the reports, none of which causes this court to entertain any contrary view to that just expressed, and they need be but briefly considered. These are the reference in the February 26 report to the date of the check covering the Forman-Moore investment in Ace, and a statement in an FBI report dated January 24, 1962, attributable to Lawrence, the president of Ace, as to Forman's presence in the United States.[53]

As to the first item, petitioner contends that had he known at the time of trial of the $33,332.66 check which bore the date April 28, 1961, it would have served to corroborate his testimony that Forman and Moore, as well as Erdman, were in his chambers on March 29, 1961, which

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[53] Petitioner also charges that an FBI report of October 17, 1961, contained information that was "suppressed". The report, a summary of investigative activities, sets forth (Exhibit C, p. 55) that an examination of Erdman's deposit slips at the Chemical Bank New York Trust Company reflects "only two cash deposits, one on April 17, 1961, for $2,500.00 and one on May 3, 1961, for $2,000.00". Despite this simple statement, petitioner charges ". . . that these deposits were unexplained as to source and were necessarily made by Erdman in order to cover the two checks he had written in connection with his investment in Ace Manufacturing". The report nowhere states that the deposits are "unexplained"—that is petitioner's allegation. No evidence has been submitted or developed to support petitioner's charges with respect to this report; nor is there any proof that petitioner did not have it at the trial (Singer's affidavit does not mention this report). The fact, blithely ignored by petitioner, is that the deposit slips for the $2,500 and the $2,000 items were made available to petitioner at the trial, were initially offered as exhibits by his counsel, but, following a discussion as to their admissibility, were marked for identification. Dr. Erdman was subject to recall for questioning as to these and other cash deposit slips, but petitioner's counsel did not follow through on his offer of the deposit slips (*see* 391 F.2d at 143-44). Any claim of suppression or any other alleged wrongful conduct with reference to the two cash deposit slips referred to in the report, or any matter pertaining thereto, is specious.

was denied by the latter three. Erdman had testified that on March 29 he was alone with Keogh in his chambers when he gave him $17,500, part of the fix money. Forman testifield that he had been abroad from July, 1960 to April 30, 1961, when he returned from England by plane; Moore also denied he was in Keogh's chambers on March 29. Petitioner further contends that the check could have been availed of to negate the force of the prosecution's attack upon his credibility, which relied upon Foreman's passport and entries therein to corroborate the testimony of Erdman, Forman and Moore.

Petitioner indulges in a number of assumptions to support the claim of suppression of material evidence. He assumes that the report states that the check was actually signed in April 28, the date it bears, and that it was actually signed by Gabe Forman. The report states no such thing. It simply states that a Recordak film of the check reflected it is "dated April 28, 1961, payable to 'Gerald Topper' in the amount of $33,332.66. . . . [I]t was drawn on account number 112-17-6861 at the Meadow Brook National Bank, Woodmere, Long Island, New York, and was signed 'Gabe Forman'."[54]

Again the petitioner's failure to offer affidavits or testimony of those with knowledge of the facts as to the issuance of the check and the closing of the transaction, and instead to indulge in unwarranted assumptions, is highlighted. Entirely apart from the passport, the testimonial proof was overwhelming that Forman did not arrive in the United States until April 30, 1961. Petitioner, from the mere fact of the date April 28 on the check, takes a giant leap backward to March 29 to contradict the testimony of three

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[54] Moore testified that he thought Forman had issued the check for the Ace investment and that the funds came through the Meadow Brook bank. Defendant's counsel could readily have issued a subpoena, which would have turned up the Recordak film of the check.

witnesses and documentary proof. An inference from the mere date of the check, if permissible at all, in the absence of other proof, would not, in this court's judgment, have swayed a single juror—particularly so, in the face of the consistent testimony of Erdman, Moore and Forman, corroborated by the two passport stamps placing Forman in England until his arrival here on April 30 and outside the United States on March 27, when considered against Keogh's original statement to the FBI, which coincided with Erdman's version that they were alone at the March 29 meeting, but was at odds with Keogh's own trial testimony, his uncertainty at the trial that it was Forman who was introduced to him on March 29, and his dubious explanation of refreshed recollection based on a diary entry, that resulted in his differing trial testimony.[55] Inconsistencies of greater proportion than here alleged were exposed and argued extensively by the defense. The information here relied upon by petitioner against the background of the trial testimony could not have been of material aid in furtherance of his defense or affected the jury result.

And of even less substance is his further contention with respect to a statement attributable to Lawrence, the president of Ace, in the FBI report of January 24. Petitioner's claim here is based upon a distortion of what in fact is set forth there. It reports that Arthur Lawrence, president of Ace, when interviewed by an FBI agent in June, 1961, stated that around Christmas 1960, "David Foreman," residing in England, obtained an order for 100 slot machines, which were to be shipped to England; that "after returning to the United States [he] visited the Ace Manufacturing Company plant at Glen Burnie, Maryland"; that Forman, who subsequently resided at Oceanside, New York, "interested Dr. Erdman and Sanford J. Moore in Ace

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[55] *Cf.* United States v. Kahaner, 317 F.2d 459, 480 n. 13 (2d Cir. 1963).

Manufacturing Company with a view toward having them invest money in that company." The report nowhere states that Lawrence fixed the date when Forman returned to the United States or resided at Oceanside, New York. However, petitioner's attorney argues: " 'This interesting of Erdman and Moroe' obviously culminating in the agreement of April 28, 1961 between Forman, Erdman, Moore and Ace Manufacturing . . . had to be prior to that date." Again, without evidential support,[56] he concludes: "It is clear from the January 24, 1962 FBI report that Forman was in the United States at or sometime or times between Christmas 1960 and April 21, 1961. . . ." The latter date is based on a letter dated that day, also referred to in the same report, sent to Dr. Erdman by attorney Topper with respect to Ace's financial status. Topper's letter makes no reference to Forman. Petitioner's conclusory allegations are neither sustained nor warranted by the report allegedly withheld. There is not the slightest basis for the assertion that it could have been of significant use to support petitioner's version as to who was present at the March 29 conference. Petitioner has had the January, 1962 report for several years prior to the filing of his instant application; again, the omission of an affidavit from Lawrence, Topper or any supporting data or any explanation for their omission is striking.[57] The information could not materially have aided the defense; it does not reach the level of evidence that could possibly have been useful to the defense.[58]

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[56] Petitioner disregards the overwhelming evidence that Forman learned of the Ace investment while abroad through Moore during one of their regular transatlantic telephone calls, which occurred about every ten days or two weeks.

[57] It has already been observed that defense counsel refused Erdman's offer to "bring my checks here this afternoon and my checks will show that the first payment to Ace was prior to Forman arriving in this country". SM 639-40; *see* n.25 *supra*.

[58] *Cf.* United States v. Bonanno, Docket Nos. 34806, 34807, 2d Cir., July 28, 1970; United States v. Tomaiolo, 378 F.2d 26, 28 (2d Cir.), *cert. denied*, 389 U.S. 886 (1967).

In conclusion, viewed against the background of the trial and the totality of the trial evidence, neither singly nor in combination would any of the information contained in the January 24 and February 26 reports, allegedly unknown to petitioner at the time of trial, have materially aided the defense, its preparation or presentation. This court is satisfied to a moral certainty that such information would not have permitted the petitioner so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a single juror—and so, too, it raises no such doubt in this court's mind.

The petitioner urges this court to reconsider its previous finding regarding lack of motivation of the prosecution. The court, with respect to the report then under consideration, found "no conscious or deliberate withholding . . . by members of the prosecution staff, and further that they cannot even be faulted for forgetfulness, much less negligence".[59] Nothing has now been presented to cause this court to change that finding, or to make any other finding, with respect to the January 24 and February 26, 1962 reports, assuming they were not turned over or made available to the defense. The record is barren of any evidence to support a charge of any deliberate purpose or design by the prosecution to suppress or withhold in any respect information or evidence that could have been of material value or use to the defense, its preparation or presentation. Indeed, this court's current review of the record in connection with the instant application reaffirms the view previously expressed that "[t]his was not a case where the prosecution held its records close to its vest".[60] The record discloses an attitude by the prosecution of making available to the defense more than was legally required.[61]

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[59] 289 F. Supp. at 271.

[60] 289 F. Supp. at 272.

[61] Affidavits were made available by the government to the defense prior to or at the trial and before the presentation of any evidence, *e.g.*, SM 308.

Repeated statements by petitioner's counsel, who was not a participant in nor present at the trial, that the case against the petitioner was a close one requires this court, in the interest of an accurate record, to repeat its previously expressed observation:

> "[T]hat the evidence presented against petitioner was overwhelming; that it did not rest solely upon Erdman's word against petitioner's; and that there was corroborative evidence of a substantial and most compelling nature, much of it based upon petitioner's acts and conduct as well as documentation in his handwriting".[62]

One had to be present at the trial from day to day as it unfolded, and to have seen and heard the witnesses, government and defense, to have sensed "the actualities of a long trial";[63] to understand that the government's case as finally developed cascaded down with the force of an onrushing falls, and that the information now relied upon, allegedly suppressed, could not and would not have averted the verdict of guilty. The court concludes that no act, conduct or omission on the part of the prosecution in any respect violated petitioner's constitutional right to a fair trial. He received a fundamentally fair trial. The interest of justice does not require a new trial.

Unless we have reached the point that a trial must be flawless, that there must be perfect symmetry in the testimony of government witnesses, that the prosecution must disgorge its entire file to the defendant, whether or not it has matter useful to his defense, there is no basis upon the charges contained in the moving papers, which in the main consist of argument and assumptions by petitioner and his counsel, to issue the writ of error coram nobis.

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[62] 289 F. Supp. at 273.

[63] Glasser v. United States, 315 U.S. 60, 88 (1942) (Frankfurter, J., concurring).

Rather than witnesses to substantiate his latest charges, petitioner substitutes rhetoric for evidence, conjecture for fact. With the exception of Mrs. Erdman, who has died since the first coram nobis hearing, all others with knowledge of the facts touching upon his present claims were available to offer proof. However, instead of evidence, petitioner has been satisfied to rely upon dialectical projections and conclusory allegations. These are no substitute for proof. Certainly they do not warrant the vacatur of a judgment of conviction entered eight years ago after a trial at which petitioner, represented by able and experienced counsel, had a full and fair opportunity to defend himself. The Supreme Court has admonished that the extraordinary writ of error coram nobis should issue "only under circumstances compelling such action to achieve justice".[64] This is not such a case.

The application is denied in all respects and the petition dismissed.

EDWARD WEINFELD
United States District Judge

Dated: New York, N. Y.
August 5, 1970

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[64] United States v. Morgan, 346 U.S. 502, 511 (1954).

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No. 71-371

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES VINCENT KEOGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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JAMES VINCENT KEOGH, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1962 petitioner and two others—Elliott Kahaner, and Antonio Corallo—were tried by a jury in the United States District Court for the Southern District of New York under an indictment charging that they and others had conspired to obstruct justice by improperly attempting to influence the outcome of a criminal prosecution for bankruptcy fraud in the Eastern District of New York, in violation of 18 U.S.C. 1503. Petitioner and his co-defendants were convicted, and on August 2, 1962, petitioner was sentenced to imprisonment for two years. The court of appeals affirmed *sub nom. United States* v. *Kahaner,* 317 F. 2d 459 (C.A. 2), certiorari denied, 375 U.S. 836.

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In June 1967, petitioner filed with the sentencing court a petition for a writ of error *coram nobis,* charging that the prosecution at trial had knowingly suppressed exculpatory evidence and had used perjured testimony. The petition was denied without a hearing, 271 F. Supp. 1002 (S.D.N.Y). The court of appeals affirmed in every respect except one—the suppression of certain alleged exculpatory matter—on which it ordered an evidentiary hearing. 391 F. 2d 138. Following such a hearing the district court once more dismissed the application for *coram nobis.* 289 F. Supp. 265. The court of appeals affirmed as to the matter in question at the hearing, but indicated that petitioner could assert in a new petition certain claims which he had attempted to raise for the first time on that appeal. 417 F. 2d 885 (C.A. 2).

Seven months later petitioner filed a second petition for a writ of error *coram nobis,* alleging in essence that the government at trial had wrongfully withheld F.B.I. investigative reports containing exculpatory material. On August 5, 1970, the district court in an exhaustive opinion dismissed the petition without hearing (316 F. Supp. 921 (S.D.N.Y.), Pet. App. B. 21–50). The court of appeals affirmed (440 F. 2d 737 (C.A. 2), Pet. App. A. 1–20).

The judgment of the court of appeals was entered on March 12, 1971. A petition for rehearing was denied on April 16, 1971. On July 6, 1971, petitioner applied for an extension of time within which to file his petition for a writ of certiorari. The following day, Mr. Justice Harlan granted the extension to and

including September 13, 1971. Notwithstanding the extension, the petition, filed on September 13, is out of time since the application for an extension was not timely filed. A writ in the nature of *coram nobis* is regarded as a "step in the criminal case * * *" *United States* v. *Morgan,* 346 U.S. 502, 505 n. 4. Accordingly, in seeking review of decisions denying the issuance of such a writ, petitioner was required to file the petition within thirty days after the entry of the judgment by the court of appeals, and should have sought an extension of time prior to the expiration of that thirty-day period. Rules 22(2) and 34(2) of the Rules of this Court. The failure to comply with these rules makes his petition untimely. In any event, the petition does not warrant plenary review.

1. The facts in this case have been set forth at length in the prior opinions of the lower courts. In essence, they show that in January 1961, following the arrest of several individuals on charges of concealing assets of a bankrupt corporation, attempts were made to obtain favorable treatment for the defendants, particularly one Sanford J. Moore. Dr. Robert Erdman, an influential physician, agreed to act on behalf of the defendants. He secured the cooperation of co-defendant Kahaner, an Assistant United States Attorney in the Eastern District of New York, who agreed for $35,000 to indict only two or three of those arrested, and to guide the case to a specific judge for arraignment. During a meeting in February 1961, Kahaner suggested that petitioner, a widely respected Justice of the Supreme Court of New York for Kings County,

be brought into the matter. Erdman later met with petitioner, who agreed to be of assistance in exchange for a monetary consideration.

Due to a change in the assignment of judges, arraignment of the three individuals indicted, including Moore, was moved up to early March 1961. All three entered pleas of guilty on March 9, and sentencing was set for March 30, before Judge Rayfiel. Between those dates, Erdman, Kahaner and other interested parties (but not petitioner) held meetings to discuss their approach. By March 29, 1961, Kahaner had been paid $10,000 and petitioner $5,000. On that date, Erdman, Moore, and Kahaner held an early morning meeting, at which Kahaner was paid $2,500. Erdman then went to petitioner's chambers to give him $17,500 and to remind him that Moore's sentencing was to take place the next day. Petitioner agreed to arrange a luncheon with Judge Rayfiel that day and to discuss with the judge whether consideration could be given to Moore. At their luncheon meeting, Judge Rayfiel told petitioner that he considered Moore the worst offender in the bankruptcy fraud scheme. Judge Rayfiel mentioned, too, that two other federal judges had indicated that rumors prevailed that "everything has been taken care of" in regard to Moore's sentence. Petitioner reported this conversation to Erdman, who repeated it to Moore. That evening, Moore instructed his attorney to seek withdrawal of the guilty plea.

On March 30, 1961, the attorney filed his motion to withdraw the plea. Following argument, the motion

was denied, and Moore was sentenced to imprisonment for three years, subsequently reduced to one year. During April 1961 petitioner, Kahaner, Erdman and Moore met at various times to determine whether an offer of restitution as to some of the assets fraudulently concealed from the bankrupt company might persuade Judge Rayfiel to reduce the sentence. Such an offer was ultimately made to the judge. Prior thereto petitioner had reviewed the terms of the offer, and had insisted that a certain condition as to reduction of the sentence be eliminated.

2. The present controversy centers around the $35,000 which the government established as having been paid to Kahaner and petitioner. At trial petitioner had denied receiving any portion of the money, and had suggested that Erdman kept the bribe funds furnished by Moore, and eventually used them as his share of an investment in the Ace Manufacturing Company, in which Moore, Erdman, and one Forman had purchased an interest.

At the hearing on petitioner's first *coram nobis* application, he had charged the government with suppression of an F.B.I. report, dated November 28, 1961, which had traced Erdman's bank deposits from January through August, 1961, and had accounted for all but four deposits in February. The government established at that time that the four February deposits did not involve bribe money, but had innocent sources. However, during that hearing, petitioner obtained information that in 1961 Erdman's wife had a safe deposit box which she had closed out on June 29, 1961,

and that on June 28th Mrs. Erdman had purchased $15,000 of United States Savings Bonds. In the second *coram nobis* application, petitioner contended that had he known the facts about the safe deposit box at trial, his counsel could have fashioned them into a new line of defense, to the effect that the $15,000 represented the first installment of the bribe money; that it had been given to Mrs. Erdman by her husband to place in the safe deposit box; and that as a result of being frightened by Moore's subsequent disclosures to federal agents Erdman had his wife close out the safe deposit box and use the money to purchase the bonds.

A second claim for relief below was connected to the investment in Ace Manufacturing Company. The claim was based upon an F.B.I. report, dated February 26, 1962, which petitioner alleged had deliberately not been produced at trial. The report stated that the Erdman-Moore-Forman acquisition of an interest in Ace cost $50,000; that a checking account was opened with a $100 deposit in the name of Forman in a particular New York bank on May 2, 1961; that on May 4, there was drawn on this account a check in the amount of $33,332.66 which was dated April 28 and which bore Forman's name as payor, resulting in an overdraft of $33,232.66; and that on May 5, a deposit of $33,500 cash, in bills of denominations from $10 to $100, was made in the account. The purpose of the check evidently was to cover the investment in Ace. Petitioner alleged that had he known of the

report at trial, he could have used it to substantiate his claim that he had not received the bribe money but that Erdman returned the $35,000 to Forman, who used it to invest in Ace.

3. The sole issue involved in this petition is whether the district court properly denied the second petition for a writ of error *coram nobis* without a hearing. The exhaustive opinions of the lower courts (Pet. App. A, B), upon which we rely, amply demonstrate that such extraordinary relief was not warranted in petitioner's case. At the outset, it must be noted that, contrary to the repeated statements of petitioner and present defense counsel (who were not participants at trial), this was not a close case. In the opinion of the experienced district judge, who has been involved in this case from the trial to the present collateral proceedings, the evidence against petitioner was "overwhelming" (Pet. App. 49a) and nothing was deliberately withheld by the government from petitioner. The case against petitioner did not rest solely upon Dr. Erdman's testimony; there was corroborative evidence "of a substantial and most compelling nature," including testimony by others as to petitioner's conduct and documents bearing his handwriting. 289 F. Supp. at 273. Against this background, petitioner's suggestion that the uncovering of some shred of evidence having a remote connection with the defense requires relief from his conviction was properly rejected. Petitioner's claim that the lower courts applied an improper and unduly severe standard in determining the basis

for *coram nobis* relief (Pet. 20–30)[1] is not fairly presented in a factual situation where, by any reasonable standard, no relief is warranted. *United States* v. *Morgan,* 346 U.S. at 511; see also *Byrnes* v. *United States,* 408 F. 2d 599 (C.A. 9), certiorari denied, 395 U.S. 986; *Gajewski* v. *United States,* 368 F. 2d 533 (C.A. 8), certiorari denied, 386 U.S. 913.

Petitioner also assails the failure of the district court to conduct a hearing on his *coram nobis* petition. As the courts below noted, at the argument of the motion before the district judge, both parties had taken the position that no evidentiary hearing was necessary and had urged that the issues could be decided upon the voluminous moving papers, the files and the record of the previous proceedings (Pet. App. 5a, 22a–23a). The district judge found no difficulty in resolving the questions presented without a hearing. The court held in essence, that, notwithstanding the bulk of papers filed by petitioner, he had failed to present evidence which might have given credence to the manner in which he claims he could have used the missing reports at trial; that, in any event, the testimonial and documentary evidence admitted at trial contravened the "unwarranted assumptions" he had made in asserting how he could use the reports (Pet.

[1] But see the statement by the court of appeals that the district judge properly ruled that petitioner was not entitled to relief where his claim, even if substantiated, "would not have created a reasonable doubt of petitioner's guilt in the mind of a juror who was otherwise satisfied—even if we assume the applicable test in *coram nobis* to be no higher than that * * *." 440 F. 2d at 745, Pet. App. 15a.

App. 45a); that whether or not the F.B.I. reports themselves had not been made available to him, the information contained therein "was as much available to the defense as to the prosecution" (Pet. App. 36a); and that the court was convinced "to a moral certainty" that the claimed undisclosed evidence could not have raised a reasonable doubt as to guilt in the mind of a single juror (Pet. App. 48a).

The court of appeals believed that a hearing might have been of some help to resolve the case but since neither party had requested one, and the interests of justice did not demand one, it would not direct that a hearing be held (Pet. App. 6a). Moreover, after a complete examination of the case, the Second Circuit expressed the conviction that petitioner "would gain nothing" by a hearing (Pet. App. 20a). In our view, a hearing was unnecessary because petitioner had not urged any claim which involved the resolution of a factual dispute. The constant reliance upon conjecture and surmise in alleging how, in hindsight, the undisclosed information could have been exculpatory, did not present a situation requiring a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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JAMES VINCENT KEOGH, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This reply is necessitated by several erroneous impressions created by the opposition memorandum filed by the United States:

1. The timeliness of the petition

Patently in error is the suggestion of the Government (Opp. 3) that the failure to file the petition for certiorari within 30 days from the entry of the judgment below renders the petition untimely. That suggestion is premised on an out-of-context reference to a footnote phrase in *United States* v. *Morgan,* 346 U.S. 502, 505, n. 4 (1954), that speaks of a motion for a writ of error *coram nobis* as a "step in the

criminal case . . ." Hence, the Government argues, the 30-day limitation specified in Rule 22(2) for filing petitions "to review the judgment of a court of appeals in a criminal case" must be deemed applicable.

This is not the first time in this *coram nobis* proceeding that the Government has raised this fallacious time argument. When the appeal was taken from the first *coram nobis* ruling of the District Court (271 F. Supp. 1002), the Government, in reliance on the footnote remark in the *Morgan* decision, urged that the 10-day limitation on the filing of notices of appeal, specified by the then F.R.Cr.P. 37(a)(2), applied so as to make the appeal untimely, the notice having been filed 27 days after entry of the order of dismissal. The Second Circuit rejected the Government's contention, holding that the filing time was governed by the 60-day limitation applicable to civil cases, as then specified in F.R.Civ.P. 73(a). *United States* v. *Keogh,* 391 F.2d 138, 140 (2d Cir. 1968). In so ruling, the Second Circuit stated in language fully applicable here (p. 140):

> "The problem to which the [*Morgan*] footnote was addressed was that F.R.Civ.P. 60(b) had abolished writs of error *coram nobis* in favor of the motion procedure there provided. The answer was that the abolition effected by Rule 60(b) cannot fairly be extended beyond the 'suits of a civil nature' to which alone, under the general provision of Rule 1, the Rules of Civil Procedure apply. We do not read the quoted statement as intending more than that. Indeed the footnote ends by characterizing a motion for *coram nobis* as 'of the same general character as one under 28 U.S.C. § 2255,' which, as indicated above, is under the civil rules as regards time for appeal. See *Heflin* v. *United States,* 358 U.S. 415, 418

> n. 7 (1959). Compare *Wells* v. *United States,* 318 U.S. 257, 260 (1943). The policy considerations supporting prescription of a very short time for appeal in a criminal case are notably absent in *coram nobis.*"

In other words, a writ of error *coram nobis* that is sought to relieve one from the effects of a criminal judgment was viewed in *Morgan* as "a step in the criminal case" solely to distinguish it from a writ of error *coram nobis* involving a civil judgment—where the writ has been abolished by Rule 60(b) of the Federal Rules of Civil Procedure. In all other respects, the *coram nobis* writ in the criminal context is considered to be "of the same general character as . . . [a motion] under 28 U.S.C. § 2255" or a motion for habeas corpus. See *Morgan,* 346 U.S. at 506, end of n. 4.

It is clear, of course, that petitions involving post-conviction collateral proceedings under 28 U.S.C. § 2255 or proceedings in habeas corpus can be considered as steps in a criminal case; yet they are "civil" cases within the meaning of this Court's filing time requirements, so that the 90-day time limit prescribed for civil cases, rather than the 30-day limit of Rule 22(2), applies. *Heflin* v. *United States,* 358 U.S. 415, 418, n. 7 (1959); and see Stern and Gressman, *Supreme Court Practice,* Sec. 6.1, p. 240 (4th ed. 1969). The close similarity between *coram nobis* and the habeas corpus and § 2255 actions, as recognized in *Morgan,* makes inescapable the conclusion that the *coram nobis* petition is also subject to the 90-day filing time limitation in this Court. And it would thus follow that the instant petition was timely filed, it

having been filed within the additional 60-day extension properly granted by Mr. Justice Harlan.

Since the Government seems repeatedly confused by the *Morgan* footnote reference, it might be appropriate for the Court to clarify the matter, as above suggested, should certiorari otherwise be granted herein.

2. The appropriateness of granting certiorari

The Government has sought to oppose certiorari by largely ignoring the certiorari considerations set forth in the petition and by contenting itself with such erroneous assertions as that "petitioner had not urged any claim which involved the resolution of a factual dispute" (Opp. 9) and that the petitioner's claim respecting the standard for *coram nobis* relief "is not fairly presented in a factual situation where, by any reasonable standard, no relief is warranted" (Opp. 8).

To begin with, the Government has not denied the existence of differences, stemming from decisions of this Court and of other Circuits, as to the proper standard to be applied to an application for *coram nobis* relief. See Pet. 21-30. Nor has the Government denied the appropriateness of resolving and clarifying that problem. What is now important is the fact that "by any reasonable standard" petitioner would clearly be entitled to relief. Significantly, the Government by its silence virtually concedes that under the *Griffin* standard (336 U.S. at 709), it would be "too dogmatic on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." Such evidence here consisted of the proof of a suspicious cash

deposit by Forman (a named co-conspirator) of some $33,350, consisting of over 600 bills, which was used to finance the Ace investment—rather than to make any bribe payments.[1] On the present state of the record there does not appear to have been sufficient money available to the co-conspirators to have made both the Ace investment (which was documented in the FBI report) and the payment of the alleged bribe. In these circumstances, the jury, or any one of its members, might well have attached significance to this exculpatory evidence as to the Ace investment and concluded that a reasonable doubt did indeed exist whether petitioner received any money.

Yet even under the Second Circuit's dubious standard, which was discredited by the majority of this Court in *Morgan* (see Pet. 23-25), petitioner might have been able to demonstrate that "he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror" had he been accorded the evidentiary hearing to which he was entitled as a matter of right and been given the chance to develop all pertinent facts. Contrary to the Government's undocumented assertion (Opp. 9), the claim as to the suspicious bank deposit did "involve the resolution of a factual dispute." The petitioner has vigorously contended that the factual information in the FBI report warranted the conclusion that the alleged bribe money actually went to finance the Ace investment, a contention the Government has consistently denied. The Government obviously felt that this claim of the petitioner was so substantial as to warrant

[1] The FBI report of February 26, 1962, stated that Forman had refused to reveal the source of this deposit.

its own extensive factual investigation, and it obtained two lengthy adjournments of the *coram nobis* proceeding for that purpose. While the Government represented to the District Court that much evidence had already been uncovered in that investigation, none of that evidence was ever revealed.

Thus there exists an unresolved factual dispute of the first magnitude. What was the real source of the 600 bills that constituted this bank deposit? Was there sufficient money sent to Moore from the English company to make both the Ace investment and the bribe payment?[2] Was the bribery money actually diverted at the last moment into the Ace investment? The Second Circuit's opinion does not even purport to answer those questions, for the record has not been sufficiently developed.

The Government's ultimate reliance (Opp. 9) on the Second Circuit's erroneous statement that neither party requested an evidentiary hearing[3] serves only to underscore the importance of the question as to the applicant's absolute right to an evidentiary hearing where serious factual questions are at stake. See Pet. 30-33. No authority can be cited to the effect that a formal request for such a hearing is an es-

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[2] In requesting a hearing, the Government represented that it would receive financial records of the English company so as to document the source of the Forman bank deposit. But the Government never revealed what those records demonstrated. See Pet. 32, n. 14.

[3] See Pet. 31, n. 14, from which it is apparent that the Government did request a hearing and that the petitioner sought such a hearing as alternative relief. The Second Circuit stated that it had "contemplated" an evidentiary hearing.

sential predicate. It would appear from the *Morgan* decision, 346 U.S. at 512-513, that in cases where there are unresolved factual disputes pertinent to the right to relief, the motion for *coram nobis* relief "*must* be heard by the federal trial court," inasmuch as the applicant "*is entitled* to an opportunity to attempt to show that his conviction was invalid." (Emphasis added.)

Various other misstatements in the Government's brief need not here be corrected, with one exception. That the trial itself was a close case, making the newly uncovered evidence of possibly decisive importance, is not merely the opinion of "petitioner and present defense counsel (who were not participants at trial)." Opp. 7. Whatever the trial judge's present recollection may be (Pet. App. 49a), the Second Circuit on direct review of the original conviction in 1963 found that the case was indeed a close one. Thus that court held that "there is a sharp conflict in the evidence and the Government's case depends in large part on the testimony of persons who admit guilt of the crime with which the other defendants are charged." 317 F. 2d at 467. And it further commented that careful review was necessary in this case "where there was such real basis for the existence of reasonable doubt and the consequences of a wrong verdict are so tragic." 317 F. 2d at 485. Against the background of such a close trial, the addition of the new evidence might well have tipped the scales for petitioner in the minds of conscientious jurors.

CONCLUSION

For these additional reasons, supplementing those in the petition, certiorari should issue to review the judgment and opinion of the Second Circuit.

Alternatively, because petitioner's right to an evidentiary hearing is so absolute in these circumstances, it may be appropriate to grant certiorari, vacate the judgment of the Second Circuit, and remand the matter to the District Court with directions to hold an evidentiary hearing on the instant *coram nobis* application.

Respectfully submitted,

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